(1) 2007

No.

IN THE

Supreme Court of the United States

G. MARK JENKINS, M.D.,

Petitioner,

v.

METHODIST HOSPITALS OF DALLAS, INC.; HOWARD CHASE; JOHN HAUPERT; JACK BARNETT; KELLY WOLFE; TIM MEEKS; AND KIM HOLLON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated: June 18, 2007

QUESTIONS PRESENTED

This Court held in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), that a discrimination plaintiff survives a motion for judgment as a matter of law if he submits (i) evidence supporting a prima facie case, as described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and (ii) evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. Furthermore, it held in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) that discriminatory animus, even if proved only indirectly, need only be "a motivating factor" in the adverse employment action, even if other legitimate factors also motivated the employer's decision.

The questions presented by this petition are:

1. Whether, contrary to *Reeves*, *Desert Palace* and the decisions of other circuits, the Fifth Circuit erred in holding that racial remarks made by the hospital manager principally responsible for summarily suspending a minority doctor could not support a jury inference of racial animus, merely because the remarks were not made at the time of the adverse action or in specific reference to the plaintiff?

2. Whether, contrary to *Reeves*, *Desert Palace* and the decisions of other circuits, the Fifth Circuit erred in failing to consider the evidence and inferences that established Plaintiff's prima facie case when considering the further questions of whether the defendants' explanation of their conduct was pretextual and whether Plaintiff's race was "a motivating factor" in the adverse action taken against him?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner G. Mark Jenkins, M.D., ("Dr. Jenkins") was the appellant in the Court of Appeals and the plaintiff in the district court.

Respondents Methodist Hospitals of Dallas, Inc., Howard Chase, John Haupert, Jack Barnett, Kelly Wolfe, Tim Meeks, and Kim Hollon (collectively "the hospital") were appellees in the Court of Appeals and defendants in the district court. Methodist Hospitals of Dallas, Inc., is a not-for-profit corporation organized under the Texas Non-Profit Corporation Act and as such has no owners. *See* TEX.REV.CIV.STAT.ANN. art. 1396-1.02(3) (West 2003) (forbidding members, directors, and officers of a non-profit corporation to share in its profits).

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 2
STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 13
I. The Fifth Circuit's decision conflicts with this Court's decisions in *Reeves* and *Desert Palace* and with the decisions of other circuits. 13
II. Summary reversal may be warranted. 19
CONCLUSION 22

TABLE OF AUTHORITIES

Pages

Cases

Adams v. Ameritech Services, Inc., 231 F.3d 414 (7th Cir. 2000) 17

Auguster v. Vermilion Parish School Bd., 249 F.3d 400 (5th Cir. 2001) 14, 15

Auguster v. Vermilion Parish School Bd., 249 F.3d 400 (5th Cir. 2001) 14

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003)..... i, 14

Dunaway v. International Broth. of Teamsters, 310 F.3d 758 (D.C. Cir. 2002)..... 17

Fisher v. Pharmacia & Upjohn, 225 F.3d 915 (8th Cir. 2000)..... 17

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)..... i

Miller-El v. Dretke, 545 U.S. 231 (2005)..... 20, 21, 22

Patel v. Midland Memorial Hosp., 298 F.3d 333 (5th Cir. 2002)..... 14, 15, 16

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)..... passim

Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392 (5th Cir. 2000) 14

Russell v. McKinney Hosp. Venture, 235 F.3d 219 (5th Cir. 2000) 14

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)..... 13

Tennard v. Dretke, 542 U.S. 274, 283 (2004) 21

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)..... 18

Tomassi v. Insignia Financial Group, Inc., 478 F.3d 111 (2d Cir. 2007) 17

Wallace v. Methodist Hosp. System, 271 F.3d 212 (5th Cir. 2001) 14

Statutes

28 U.S.C. § 1254(1) 2, 12

Tex. Rev. Civ. Stat. Ann. art. 1396-1.02(3) (West 2003) ii

Rules

Fed. R. Evid. 401 13

Regulations

45 C.F.R. § 60.9 8

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PETITION FOR WRIT OF CERTIORARI

Petitioner G. Mark Jenkins, M.D. ("Dr. Jenkins") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the district court granting Defendants' motion for summary judgment, which is unpublished, is available at 2004 WL 3393380 and is reprinted as Appendix B (pages B1-B46). The disposition of the Section 1981 claim appears at pages B39-B45.

The Fifth Circuit's opinion affirming the summary judgment is reported at 478 F.3d 255 and is reprinted as Appendix

A (pages A1-A15). The portion pertaining to the Section 1981 claim appears at pages A1-A9.[1]

JURISDICTION

The Fifth Circuit issued its opinion on January 31, 2007, and denied rehearing and rehearing *en banc* on March 19, 2007. App. C1-C2. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1981(a) of Title 42 of the United States Code provides, in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 2000e-2(m) of Title 42 of the United States Code provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

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[1] The final part of the court of appeals' opinion resolves a separate appeal taken by Dr. Jenkins's lawyer in the district court, whom the district court had reprimanded for misquoting an affidavit in a brief. The district court did not sanction Dr. Jenkins and made clear that his fate should be based on a correct legal analysis of the record under FED. R. CIV. P. 56. (9 Tr. at 14.) The Fifth Circuit combined the two appeals prior to oral argument.

STATEMENT OF THE CASE

Dr. Jenkins appeals a summary judgment disposing of his § 1981 race-discrimination claim against Methodist Hospitals of Dallas, Inc., and six of its managerial employees (collectively, the hospital). The overarching question is whether he adduced sufficient evidence to warrant a trial on the question of discriminatory intent. The district court concluded that he did not. The Fifth Circuit affirmed.[2]

The facts, presented in the manner required by the standard of review,[3] are as follows:

Dr. Jenkins, an African-American, is a Johns-Hopkins-trained interventional cardiologist who is eminently qualified to practice his subspecialty, primary angioplasty. This is an emergency procedure in which individuals having heart attacks are expeditiously catheterized to clear their arterial blockage before heart tissue dies due to insufficient oxygen. He is one of only two black cardiologists ever to practice at the hospital and the only one ever to work in the cath lab.

On July 25, 2000, due principally to the efforts of the hospital's Chief of Internal Medicine, Dr. Jack Barnett, the hospital effected an immediate "summary suspension" of Dr. Jenkins's cath-lab privileges and reported this to the National Practitioners Data Bank (NPDB). Summary suspension is reserved for cases in which "a physician has committed some egregious act or omission (e.g., shown up for work clearly

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[2] Still pending in the district court is the hospital's motion to recover more than $335,000 in attorneys fees from Jenkins on grounds that his claims were "frivolous, unreasonable, and without foundation." The motion was heard more than two years ago, but remains unresolved due to the pendency of the appeal.

[3] All reasonable inferences are drawn in favor of Dr. Jenkins and all evidence favoring the hospital that the jury is not required to believe has been disregarded. *See Reeves*, 530 U.S. at 150-151.

inebriated)."[4] Its purpose is "to protect patients from imminent danger, rather than for reasons that warrant routine professional review actions."[5]

In this case, no such egregious acts or omissions existed. In fact, though Dr. Jenkins requested that they do so, the hospital was unable to identify a single patient whom he had ever endangered. Rather, the hospital's purported reason for summarily suspending Dr. Jenkins was the claim that his rude and brusque "style" of communicating with cath lab employees was chiefly responsible for creating a "hostile environment" there – charges insufficient to warrant summary suspension even if they had been true.[6] Even so, such charges were in fact false, as unanimously determined months later by the "fair hearing" panel at which, for the first time, Dr. Jenkins was afforded the opportunity to hear and cross-examine the hospital's adverse witnesses. App. D1-D3. Moreover, so weak was the hospital's evidence against Dr. Jenkins that the factfinders fully exonerated him *at the conclusion of the hospital's case in chief*, at which time they insisted on bringing the hearing to an early close. His catheterization privileges were then reinstated seven months after they had been summarily suspended.

But Dr. Jenkins now lives with the professional consequences of having a summary suspension on his record. As one physician avowed, "every hospital will ask about suspension on every request for privileges. Willful, inappropriate

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[4] American Health Lawyers Assoc., PRACTICE GUIDE - PEER REVIEW GUIDEBOOK (1999) p. 42, *quoted in* Pl. App. at 597.

[5] U.S. Dept. of H.H.S., NATIONAL PRACTITIONER DATA BANK GUIDE-BOOK, E-20; Online at: http://www.npdb-hipdb.com/pubs/gb/NPDB_Guidebook_Chapter_E.pdf

[6] Given that primary angioplasty requires Dr. Jenkins to race the clock to complete the delicate procedure before his patient dies on the table before him, he would be derelict in failing to communicate with his support staff in a way that was less than direct, urgent, and intolerant of error.

actions of suspension or [a] listing on the [National Practitioner] Database is equatable to character and career assassination."[7] Dr. Jenkins has already been denied privileges at another hospital on at least one occasion because of that institution's concerns about the summary suspension.

Orchestrating these events was the hospital's chief of internal medicine, Dr. Jack Barnett, whom the Fifth Circuit's opinion describes as "obviously in a position to influence the decision to suspend Jenkins." App. A7. He is a bigot with a long history of mistreating minority doctors at the hospital. He once asked a Hispanic interviewee "why on earth would a minority think he would have the right to go to medical school at all."[8] Dr. Barnett told an African-American doctor that he "could teach a monkey" to practice medicine the way he did.[9] And a minority doctor who worked in Dr. Barnett's department for five years, and whose time at the hospital overlapped Dr. Jenkins's, avows:

> Within three months of my arrival at Methodist in 1994, it was clear to me that Dr. Barnett's racial animosity ran so deep that he would do or say anything in an attempt to force me to leave Methodist. His actions included everything from false accusations to racial insults. On one occasion, he referred to African-Americans as gun-toting, drug pushing spooks."
>
> Out of concern that Dr. Barnett would do to me what he ultimately did to Mark Jenkins, I left Methodist in 1999."[10]

The hospital has conceded that Dr. Barnett's description of blacks as "gun-toting, drug-pushing spooks" is a "slur [that], if made, would unquestionably demonstrate race-based ani-

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[7] Pl. App. at 629 ¶ 8.

[8] Pl. App. at 637.

[9] Pl. App. at 635.

[10] Pl. App., p. 637-638.

mus."[11] (One wonders, given that the standard of review *required* the court of appeals to accept that the slur had been made, why this admission did not end the matter in Dr. Jenkins's favor, given the Fifth Circuit's further conclusion that Dr. Barnett was "obviously in a position to influence the decision to suspend Jenkins." App. A7.) But this affidavit reveals more than a remark. It shows a pattern of conduct in which Dr. Barnett employs racially charged language in the presence of minority doctors, insults them, and falsely accuses them.

Dr. Barnett adhered to this pattern in his actions against Dr. Jenkins. He insulted Dr. Jenkins during the initial application process, before he had even commenced work at the hospital. He informed Dr. Jenkins then "that he wouldn't let me [Jenkins] treat his dog."[12] And by aggressively promoting Dr. Jenkins's summary suspension on the false grounds that he was chiefly responsible for causing a hostile environment in the cath lab, Dr. Barnett was acting in accordance with his racist *modus operandi* towards minorities in general.

Dr. Barnett played a key role in every stage of the proceedings against Dr. Jenkins except the final one, which cleared him. In fact, Dr. Barnett advocated summary suspension *before the peer-review investigation started, before an ad hoc investigating committee could even be formed.*[13] Thereafter, according to a doctor who attended the meeting at which Dr. Barnett took this surprising position, the "process appeared to take a pre-determined course," leading the doctor in question to suspect "a racial component" to Dr. Barnett's motivation.[14] Dr. Barnett also selected all the members of the *ad hoc* investigating committee. After his committee failed to recommend immediate suspension, Dr. Barnett became an advocate be-

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[11] Brief of Appellees, p. 47.

[12] Pl. App. at 702.

[13] Pl. App. at 654 ¶¶ 14-15.

[14] Pl. App. at 654 ¶¶ 14-15, 18.

fore the Corporate Medical Board (CMB), the hospital body that officially effected the summary suspension. In this capacity, he and another codefendant provided false information about Dr. Jenkins to the Board before they voted.[15] And Dr. Barnett is the only member of hospital management named in CMB minutes as "concur[ring] with" the decision to immediately suspend Dr. Jenkins.[16]

After Dr. Jenkins's ultimate vindication by the fairness hearing, a member of the CMB present when the decision to summarily suspend was officially made, avowed:

> In all my years of practicing medicine, I have never known a physician to be suspended with no effort to determine the accuracy of allegations as was done with Dr. Jenkins. I have also never seen a physician's career handled as carelessly by those who were bestowed the responsibility of granting and ultimately suspending Dr. Jenkins' privileges.[17]

* * *

Even if one did not know that the manager who was principally responsible for trying to push Dr. Jenkins out of the hospital was an intractable bigot, it would be possible to infer

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[15] One of the many examples of mendacity in the record is the following: A CMB member asked what a particular cath-lab supervisor, Shawn Tillman, had told the investigating committee. Tillman was the only witness Dr. Jenkins had specifically asked the investigating committee to interview, yet hers is also the only testimony that was not transcribed. The incomplete transcript then became the record that CMB members were urged to study before voting on what action to take against Dr. Jenkins. With Tillman's actual testimony unavailable to the CMB, it fell to Barnett and his hospital copresenter to fill in the gap. They did so falsely, making it seem as though Tillman had testified adversely to Jenkins, when, in fact, her affidavit makes clear that she contradicted many of the key facts on which the hospital's case for disciplining Jenkins depended. *Cf.* Pl. App. at 618 (Tillman affidavit) to Pl. App. at 533.

[16] Pl. App. at 536.

[17] Pl. App. at 644-645(¶¶4-5).

that Dr. Jenkins's race was "a motivating factor" in the hospital's decision-making from the grossly disparate treatment that Dr. Jenkins received, compared to other doctors similarly situated who were not black.

Summary suspension is both rare and extraordinarily harsh. "Of all the corrective actions taken against a physician, none carries with it such serious and immediate professional and legal repercussions as the summary suspension."[18] And summary suspension is procedurally unique in its susceptibility to manipulation: it is the only disciplinary alternative in which the penalty interrupts the doctor's ability to practice based only on a preliminary investigation. In all other peer-review investigations, even those in which ultimate termination of hospital privileges is under consideration, a full due-process hearing must precede any penalty. So if a hospital potentate were seeking to harm a doctor's career for any impermissible reason, summary suspension would be the vehicle of choice, because the target will endure a compulsory adverse NPDB report,[19] but has no right to hear the accusing witnesses, much less to cross-examine them, until a hearing months in the future, after irremediable professional damage has already been done to him.

Dr. Jenkins was treated far more severely than similarly situated doctors who were not African-Americans. The record contains no evidence that the hospital has ever summarily suspended any non-black physician for any reason. It does reveal that two non-black physicians, neither of them cardiologists, were subjected to run-of-the-mill peer review investigations for hostility toward employees, but both were accused of worse behavior than Dr. Jenkins, yet were treated

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[18] American Health Lawyers Assoc., PRACTICE GUIDE - PEER REVIEW GUIDEBOOK (1999) p. 42, *quoted in* Pl. App. at 597.

[19] *See* 45 C.F.R. § 60.9 (requiring that any professional review action that adversely affects the clinical privileges of a physician for longer than 30 days be reported to the Board of Medical Examiners).

more leniently.[20] And when one confines the comparison of the hospital's treatment of Dr. Jenkins to that of its other cardiologists, the disparity becomes even more glaring. Fourteen cath-lab nurses and technicians, the very individuals whom the hospital claimed to be protecting from Dr. Jenkins, gave affidavits avowing that he did not behave in a fashion more hostile than the other cardiologists in the lab.[21] They describe other cardiologists doing worse things: yelling, throwing furniture,[22] and in one instance, hurling an open blood-filled syringe that splashed blood into a nurse's face.[23] Despite committing in some cases actionable torts, none of the other cardiologists were suspended. None were disciplined. None were even formally investigated. Instead, hospital management instructed the employees in question to handle the dispute themselves, as a kind of personality conflict.[24]

* * *

The district court concluded that the foregoing evidence of racial animus and pretext was insufficient to warrant a trial. In so concluding, it determined that all of Barnett's racist remarks were non-probative because no single remark met all four prongs of the Fifth Circuit's improperly restrictive test of relevance for so called "stray remarks:"

> [I]n order for comments in the workplace to provide sufficient evidence of discrimination, they must be "(1) re-

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[20] Despite worse conduct, neither was summarily suspended. The action against one ("Dr. T.") was conditional: he was told to seek anger-management counseling or risk losing privileges in future, leading him to quietly withdraw without reputational harm. The other ("Dr. V.") was officially warned twice, then conditionally reappointed, and then probationarily reappointed in a subsequent year. *See* Reply Brief of Appellant, at 28-29.

[21] Pl. App. at 603(¶4), 604(¶6), 605(¶¶4-5), 606(¶4), 607(¶6), 608(¶6), 610(¶5-6), 611(¶¶8-10), 616(¶¶4-5, 9), 617(¶¶4-5, 10), 618(¶6), 619(¶6).

[22] Pl. App. at 611(¶9), 631.

[23] Pl. App. at 631.

[24] Pl. App. at 611, 622.

> lated [to the protected class of persons of which the plaintiff is a member]; (2) proximate in time to the [complained-of adverse employment decision]; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue."[25]

This test was also used to discard evidence that two cath-lab employees referred to Dr. Jenkins as a "nigger."[26]

Furthermore, the district court wholly ignored the circumstantial evidence of pretext, including that supporting Dr. Jenkins's prima facie case, and no inferences favorable to him were drawn from it. Rather than crediting such evidence and evaluating its impact on the questions of pretext or racial animus, the district court instead simply "assume[ed] *arguendo*" the existence of a prima facie case and then never even considered how such prima facie evidence bore on the question whether the hospital's proffered justification for its conduct was sufficient for summary judgment. App. B41.

This caused the district court to disregard some of the most damning evidence of pretext in the record, including the following evidence of grossly disparate treatment:

- that summary suspension is Draconian, instantly "adverse," bereft of procedural safeguards, susceptible to manipulation, and unwarranted by the hospital's accusations even if they had been true.

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[25] App. A7. The excerpted passage is lifted verbatim from the Fifth Circuit opinion. The district court applied the same test, but adapted the language to be specific to Dr. Jenkins. *See* App. B43.

[26] One of these individuals was chosen by the hospital to testify as a complaining witness before the ad hoc investigating committee. His testimony was placed in the transcript of investigating committee's proceedings, which CMB members were urged to study before voting. The other was one of a handful of prior complainants against Dr. Jenkins, whose complaint was, as were all the others, contemporaneously investigated and found to be meritless.

- that the hospital adduced no evidence of any non-black hospital doctor ever being summarily suspended for any reason;
- that the only non-black doctors previously investigated for alleged hostility toward employees were treated more leniently than Dr. Jenkins;
- that, despite being more responsible for causing a "hostile environment" than Dr. Jenkins – in fact, despite throwing furniture and hurling open syringes filled with blood – none of the other cath-lab cardiologists were suspended, disciplined, or even subjected to a collegial "peer review" investigation;

The district court also erroneously failed to attach any inferential weight to the following additional evidence of pretext:

- the gratuitous severity of the penalty imposed against Dr. Jenkins, compared to the accusations;
- that the hospital's "nondiscriminatory explanation" for its actions against Dr. Jenkins was unanimously found to be false at the only proceeding in which Dr. Jenkins was allowed to hear and cross-examine the accusing witnesses;
- that the hospital's evidence in support of its accusations was so thin that the factfinders terminated the hearing before Dr. Jenkins even put on witnesses of his own;
- that one of the three designated factfinders, Dr. Rochelle McKown, testified after the hearing that the hospital had been unable to marshal evidence supporting any of its accusations against Dr. Jenkins save one: that he was expecting more from the hospital's cath lab employees than he was receiving from them;
- that most of the very individuals whom the hospital claimed to be protecting from Dr. Jenkins offered affidavits *en masse* rebutting the hospital's accusations.

- indications that the hospital's procedures against him were dishonestly manipulated by hospital management in an effort to maximize the harm done to him.

The court of appeals affirmed for the reasons stated in the district court's opinion. App. A7. It again set forth the Fifth Circuit's peculiar "stray remark" test and used it to discard all of the evidence of Barnett's racism and his prior mistreatment of other minority doctors. *Id.* It also assumed away all the evidence supporting Dr. Jenkins's prima facie case, again refusing to evaluate such evidence for its impact on the issues of pretext and racial animus. *Id.* Going further than the district court, however, the Fifth Circuit explicitly discarded additional circumstantial evidence of pretext on the basis that it supposedly failed to show that race was the hospital's true motivation, despite Dr. Jenkins's having concededly established his prima facie case of discrimination. App. A8-A9. In short, it is clear that nothing short of direct evidence that racial animus was the sole cause of the summary suspension would have satisfied the Fifth Circuit. All other ordinarily relevant circumstantial evidence on the questions of pretext and racial animus was simply ignored or excluded by the court's application of a highly restrictive standard of relevance unknown in any other area of the law.

Dr. Jenkins petitioned both the panel and the *en banc* court for rehearing, pointing out the opinion's incompatibility with *Reeves*, and assailing the "stray remark" doctrine in particular on this basis. Both petitions were summarily denied.

Because the Fifth Circuit decision is starkly at odds with longstanding decisions of this Court, including *Reeves* and *Desert Palace*, and with those of other courts of appeals, Dr. Jenkins petitions for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *REEVES* AND *DESERT PALACE* AND WITH THE DECISIONS OF OTHER CIRCUITS.

In *Reeves*, this Court held that the Fifth Circuit "impermissibly substituted its judgment concerning the weight of the evidence for the jury's[]" when, in deciding a motion for judgment as matter of law, it refused to consider a manager's age-related comments "on the ground that they 'were not made in the direct context of Reeves's termination.'" *Reeves*, 530 U.S. at 152-153. Such evidence, even if indirect, was plainly probative of the question of discriminatory intent, this Court held, and when considering the relevance of evidence and inferences therefrom, "trial courts should not 'treat discrimination differently from other ultimate questions of fact,'" *id.*, 530 U.S. at 148 *citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993). In so holding, this Court in *Reeves* repudiated the Fifth Circuit's so-called "stray remarks" doctrine, whereby it ignored circumstantial evidence of discriminatory intent on the improper ground that it was insufficiently direct evidence of discriminatory animus.

The Fifth Circuit's application of the stray remark doctrine in the present case does precisely what *Reeves* forbids. By imposing its peculiar four-part test on all discriminatory remarks, the Fifth Circuit raises the admissibility bar far beyond simple relevance for this class of evidence, but no other. Rather than attaching inferential value to racial remarks that have "any tendency to make the existence [of racial animus] more probable ... than it would be without the evidence," FED. R. EVID. 401, the Fifth Circuit is requiring trial courts in Texas, Louisiana, and Mississippi to throw them out, unless they meet a test so stringent that only remarks virtually dispo-

sitive of racial animus could ever pass it.[27] All other remarks demonstrating racial animus by a key decision-maker – which would plainly be relevant under any ordinary application of Rule 401 – are simply ignored, leading Civil Rights cases in this part of the country to be thrown out in alarming numbers. *See, e.g., Auguster v. Vermilion Parish School Bd.*, 249 F.3d 400 (5th Cir. 2001); *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000) (same); *Ginn v. Texas Wired Music, Inc.*, 2001 WL 361044 (5th Cir. 2001); *Patel v. Midland Memorial Hosp.*, 298 F.3d 333 (5th Cir. 2002); *Wallace v. Methodist Hosp. System*, 271 F.3d 212 (5th Cir. 2001); *Moore v. United Parcel Service, Inc.*, 2005 WL 2436922 (5th Cir. 2005); *Trotter v. BPB America, Inc.*, 2004 WL 1746363 (5th Cir. 2004); *Read v. BT Alex. Brown, Inc.*, 2002 WL 22060 (N.D. Tex. 2002) (unpublished); *Ricketts v. Champion Chevrolet*, 2005 WL 1924372 (S.D. Tex. 2005) (unpublished); *Cantu v. Nocona Hills Owners Ass'n*, 2002 WL 67974 (N.D.Tex. 2002); *Brown v. Texas Saddlebags Industries, Ltd.*, 2001 WL 1636458 (N.D. Tex. 2001); and *Thompson v. Origin Technology In Business, Inc.*, 2001 WL 1018748 (N.D. Tex. 2001).[28]

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[27] Routinely disregarding all remark-based evidence simply because it is indirect or falls somewhat short of "smoking gun" status is also contrary to *Desert Palace*, which teaches that evidence need not be "direct" to be convincing, and that indirect evidence of animus is sufficient to warrant returning a verdict for the plaintiff if race was "a motivating factor" in the adverse decision, even if other legitimate factors also played a role in the employer's decision-making. *Desert Palace, Inc., v. Costa*, 539 U.S. 90 (2003) (unanimous).

[28] The Fifth Circuit does get it right on occasion, most notably in *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000) (suggesting that the Fifth Circuit's stray remark jurisprudence should be viewed cautiously in the aftermath of *Reeves*). Numerous Fifth Circuit panels, however, refuse to follow *Russell* because of a prior case, *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 400-401 (5th Cir. 2000), which they contend is "binding" because it was decided before *Russell*. *See, e.g., Auguster v. Vermilion Parish School Bd.*, 249 F.3d 400 (5th Cir. 2001). The Fifth Circuit has steadfastly refused to reconsider its stray remarks doc-

Some of the Fifth Circuit "stray remarks" cases must be read to be believed. In *Auguster*, for example, the Fifth Circuit discarded as irrelevant the school superintendent's statement one year before firing a black coach that the school had "a problem ... with past black coaches, and if there was another problem, no matter what it was, that he would do his best to get rid of [the plaintiff] from day one," as well as the superintendent's earlier comment that "he had bad luck with black men working in Abbeville." 249 F.3d at 401, 405. Similarly, in *Ginn*, the Fifth Circuit discarded a manager's remark that he wanted "young blood," purportedly because "it shows only that [the manager who made the comment] had a preference for hiring someone young and fresh from school, but not that he had animus toward Ginn based on her age." 2001 WL 361044. And then there is *Patel*, which is cited by the decision below as the basis for disregarding all Dr. Barnett's racial remarks and prior discriminatory conduct. In *Patel* the Fifth Circuit disregarded comments made by hospital doctors who had pressed management to oust the plaintiff, an Indian cardiologist, including these: their reference to Dr. Patel as a "sand nigger," their statement that he was "probably parking his camel," and their assertion that he "is nothing but a god damn Indian quack and I want him out of here. I want his ass out of here." 298 F.3d at 343-344. All of these cases are clearly contrary to both *Reeves* and *Desert Palace*, which require that the trier of fact be *permitted* to find from such comments either that racial animus was "a motivating factor" in the adverse treatment of these plaintiffs or, alternatively, that the "nondiscriminatory reasons" furnished by the defendants are unworthy of belief.

In Dr. Jenkins's case, no less than in *Reeves*, the extensive remarks and conduct proffered by Dr. Jenkins, particularly those by Dr. Barnett, are probative of racial animus. Because

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trine *en banc*, despite repeated requests that it do so, including, most recently, in this case.

he played a leading role in the hospital's adverse action against Dr. Jenkins, Dr. Barnett's belief that minorities have no proper place in medical school, his description of African-Americans as "gun-toting, drug pushing spooks," his remark to a black doctor that he practiced medicine like "a monkey," his statement to Dr. Jenkins that he wouldn't let him "treat his dog," deserve consideration. As indirect or circumstantial evidence of animus, these remarks have a tendency to make the existence of racial animus more probable than it would be without such evidence, particularly now that "mixed motives" suffices. *See Desert Palace, supra.* And this is the only threshold test such remarks are properly required to meet to deserve consideration.

Moreover, by analyzing the remarks one at a time and only after stripping them from their factual context, the Fifth Circuit improperly disregarded evidence that Dr. Barnett has mistreated minority doctors often enough for it to be considered habitual, as at least one affiant has averred. And it disregarded evidence from two other minority doctors that Dr. Barnett has mistreated them for racial reasons. Such evidence indicates that his *modus operandi* is to insult and falsely accuse in order to cause them to leave the hospital on their own.[29] And there are ample indications that Dr. Jenkins also fell victim to Dr. Barnett's preferred method of ridding his hospital of minority doctors.

In addition to being contrary to this Court's holdings in *Reeves* and *Desert Palace*, the Fifth Circuit decision below conflicts with the decisions of numerous other circuit courts. *See, e.g., Tomassi v. Insignia Financial Group, Inc.*, 478 F.3d

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[29] This issue is remarkably similar to the one presented in a case this Court recently agreed to decide, *Sprint/United Management v. Mendelson*, 06-1221. For that reason, Dr. Jenkins's petition should be held by this Court until *Mendelson* is decided and then this case should be remanded to the Fifth Circuit for reconsideration in light of *Mendelson*, if appropriate, even if this Court ultimately opts not to decide Dr. Jenkins's case on the merits.

111, 115 (2d Cir. 2007) (reversing summary judgment granted in favor of employer because, although the plaintiff's prima facie case and circumstantial evidence of pretext may have been too weak to permit an inference of animus, the district court improperly threw out remarks after classifying them as "stray," whereas "the court should have considered all the evidence in the light most favorable to the plaintiff to determine whether it could support a reasonable finding in the plaintiff's favor."); *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 428 (7th Cir. 2000) ("the Supreme Court's recent decision in *Reeves* was a cautionary note not to grant summary judgment too readily ... and not to dismiss as irrelevant damaging remarks like ... Goetz's proclaimed desire to hire people under the age of 45."); *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 922-923 (8th Cir. 2000) (concluding that, even if age-related comments by certain managerial employees were "stray remarks," when considered along with the plaintiff's prima facie case and showing of pretext, they gave rise to an inference of intentional discrimination even if such an inference would not have been possible from the other evidence of pretext alone); *Dunaway v. International Broth. of Teamsters*, 310 F.3d 758 (D.C. Cir. 2002) (reversing summary judgment on grounds that the district court, by rejecting various discriminatory comments made by management as mere "stray remarks," had erroneously injected itself into the weighing of evidence that, after *Reeves*, was the sole province of the factfinder).

* * *

The Fifth Circuit's decision below also conflicts with *Reeves* in an even more fundamental way: This Court in *Reeves* also held that, once the defendant proffers a supposedly nondiscriminatory reason for treating the plaintiff as it did, "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom ... on the issue of whether the defendant's explanation is pretextual,'" *Reeves*, 530 U.S. at 143, *quoting*

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n.10 (1981). Yet the Fifth Circuit gave absolutely no consideration to the evidence supporting Dr. Jenkins's prima facie case, drew none of the obvious inferences of pretext that naturally flow from his grossly disparate treatment compared to nonblack hospital physicians similarly situated, and instead simply *assumed* the existence of the prima facie case in order to then ignore all the evidence establishing that case. That was plain error, as *Reeves* explicitly holds:

> In holding that the record contained insufficient evidence to sustain the jury's verdict, the Court of Appeals misapplied the standard of review ... [by] disregard[ing] critical evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory reason. [Citation omitted.] The court also failed to draw all reasonable inferences in favor of petitioner."

Reeves, 530 U.S. at 152.

Because the decision below conflicts with this Court's holdings in *Reeves* and conflicts with the decisions of at least four other circuits, Dr. Jenkins's petition for certiorari should be granted. In the alternative, because his petition raises issues nearly identical to those in No. 06-1221, *Sprint/United Management v. Mendelson*, which this Court has recently taken for full review, this Court should at a minimum hold Dr. Jenkins's petition until the disposition of No. 06-1221, which disposition could well clarify the error in this case and be dispositive on remand.

II. SUMMARY REVERSAL MAY BE WARRANTED.

The Fifth Circuit's decision below shows signs that its manifest disregard of *Reeves* is not the result of mere oversight, but is a refusal to follow this Court's clear directives. The court of appeals could not prudently have failed to study *Reeves* before deciding this case, given the central role that it played in the parties' briefing, to say nothing of the petitions for rehearing which cited *Reeves* on virtually every page.[30] Both parties understood *Reeves* to be potentially dispositive. But despite its importance, the Fifth Circuit essentially ignored *Reeves*, giving it mere lip service. Its opinion devotes a mere two sentences to it, and even those ignored the dispositive aspects of *Reeves* in order to convey the false impression that it heightened, rather than leveled, the burden discrimination plaintiffs must bear when faced with dispositive motions. The Fifth Circuit decision below describes *Reeves* thusly:

> To meet the motivating-factor prong, Dr. Jenkins had to show his race "'actually played a role in [the Hospital's decision-making] process and had a determinative influence on the outcome.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)). Throughout the burden shifting, Dr. Jenkins had the ultimate burden of showing a genuine issue of material fact on whether the Hospital intentionally discriminated against him on the basis of race. *See id.* at 143, 120 S.Ct. 2097.[31]

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[30] Dr. Jenkins's original appellate brief cites *Reeves* at least 15 times, the hospital's brief cites it at least 20 times, and Dr. Jenkins's reply brief cites it four additional times. *Reeves* was also the centerpiece of both Dr. Jenkins's petition for rehearing *en banc* and his petition for panel rehearing.

[31] App. A6.

By choosing this unrepresentative quotation without further elaboration, the Fifth Circuit presented *Reeves* as supporting the notion that a discrimination plaintiff cannot survive summary judgment without adducing direct evidence of discriminatory animus. Because this is very nearly the opposite of what *Reeves* holds, as the very next sentence of *Reeves* makes clear,[32] this Court should consider simply summarily reversing the decision below in order to make clear that *Reeves* is in fact binding on the Fifth Circuit and may not be so blithely ignored.

While it may be unusual for a lower court to actively disregard this Court's precedents, it is not entirely unheard of from the Fifth Circuit. For example, in *Miller-El v. Dretke*, 545 U.S. 231 (2005), this Court was required repeatedly to correct the Fifth Circuit for its having effectively ignored evidence relevant to a *Batson* claim regarding racial discrimination in a prosecutor's use of preemptory strikes. *Batson* claims, of course, are similar to all other discrimination claims, in that the aggrieved party must establish a prima facie case of discrimination, the opposing party is allowed to proffer a supposedly nondiscriminatory justification, and the court must then determine whether such justification is pretextual or otherwise fails to rebut racial motivation. In *Miller-El*, this Court, having already twice sent the case back to the Fifth Circuit, finally reversed the New Orleans court on the

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[32] The sentence in *Reeves* that immediately follows the two reproduced in the Fifth Circuit's opinion is as follows:

> Recognizing that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," [citation omitted,] the Courts of Appeals, including the Fifth Circuit in this case, have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are based principally on circumstantial evidence."

Reeves, 530 U.S. at 141.

ultimate merits of the *Batson* claim. In so doing, this Court held that, in evaluating the State's supposedly nondiscriminatory justification for its conduct, the Fifth Circuit had failed to allow the defendant to rely on "'all relevant circumstances' to raise an inference of purposeful discrimination." *Id.* at 240. Indeed, *Miller-El* cites *Reeves* in support of its holding that a court must consider circumstantial evidence of racial motivation, including evidence of disparate treatment and the pretextual nature of the proffered nondiscriminatory justification. *Id.* at 241 (citing and quoting *Reeves*, 530 U.S. at 147). The Fifth Circuit's analysis was described as "unsupportable" and constituting a "rationalization [that] was erroneous as a matter of fact and as a matter of law." 545 U.S. at 246, 250. This Court then proceeded to rely upon evidence of disparate treatment of black and white jurors and the State's *modus operandi* and general policy and history of excluding black jurors in other cases, *id.* at 252-53, 263, 266. Such evidence is obviously analogous to Dr. Jenkins's evidence of disparate treatment, pretext, and the past discriminatory conduct and racial remarks uttered by Dr. Barnett, all of which was ignored by the Fifth Circuit below, just as it ignored the evidence in *Miller-El*.[33]

In Dr. Jenkins's case, the Fifth Circuit has proceeded "along a distinctly different track" than that commanded by *Reeves*.[34] Summary reversal may therefore be appropriate to bring home the point that the Fifth Circuit will not be permit-

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[33] Indeed, the evidence relied upon by this Court in *Miller-El* would still today be excluded by the Fifth Circuit in a *civil* case because much of it involved circumstantial evidence of discriminatory conduct (*i.e.*, a history of discrimination in other cases) not *directly* involving the adverse decision at issue in the present case.

[34] *See Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (describing the Fifth Circuit's approach to deciding the relevance of certain evidence in death penalty cases as mere "lip service" to this Court's cases and having "no basis in our precedents."). The Fifth Circuit's unduly restrictive view of the evidence relevant in race discrimination cases is similar.

ted to exempt district courts in Texas, Louisiana, and Mississippi from applying this Court's unusually clear and unanimous dictates in *Reeves*.

CONCLUSION

Because of the glaring conflict between the decision below and this Court's decision in *Reeves* and the decisions of other circuits, this Court should grant the petition for certiorari and should even consider summary reversal. The evidence of pretext and of pervasive racial animus by a key decisionmaker was more than sufficient to send this case to a jury, and the Fifth Circuit's decision to the contrary is indefensible.

In the alternative, and at the very least, this Court should hold Dr. Jenkins's case, pending its decision next term in *Sprint/United Management v. Mendelson* (06-1221), which raises a similar issue. *See* p. 16, 18, *supra*.

Respectfully submitted,

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Dated: June 18, 2007

APPENDICES

APPENDIX A

[Filed: January 31, 2007]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 05-10117

G. MARK JENKINS, M.D.,

Plaintiff-Appellant,

versus

METHODIST HOSPITALS OF DALLAS, INC.; HOWARD CHASE; JOHN HAUPERT; JACK BARNETT; KELLY WOLFE; TIM MEEKS; KIM HOLLON,

Defendants-Appellees.

No. 05-10118

G. MARK JENKINS, M.D.,

Plaintiff-Appellant,

versus

METHODIST HOSPITALS OF DALLAS, INC., ET AL.,

Defendants,

DONALD H. FLANARY, JR.,

Appellant.

Appeals from the United States District Court
for the Northern District of Texas
(3:02-CV-1823)

Before BARKSDALE, DeMOSS and PRADO, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

In the first of these two related appeals, Dr. G. Mark Jenkins contests the summary judgment awarded Methodist Hospitals of Dallas, Inc. and affiliated individuals (collectively, Hospital) against his claim under 42 U.S.C. § 1981 (providing equal contract rights for all persons under the law). Among other things, at issue is whether Dr. Jenkins, who is black, failed to establish, sufficient to defeat summary judgment, that intentional discrimination on the basis of race interfered with his ability to make or enforce contracts. At issue in the other appeal is whether the district court abused its discretion in imposing, sua sponte, under Federal Rule of Civil Procedure 11, public-reprimand sanctions against Dr. Jenkins' attorney for a misrepresentation in his brief. **JUDGMENT AND SANCTIONS AFFIRMED.**

I.

Dr. Jenkins, a cardiologist, joined North Texas Cardiovascular Associates (NTCA) in 1998, after completing a cardiology fellowship. NTCA in turn had a contractual relationship with the Methodist Hospitals of Dallas to provide cardiac services to patients. Accordingly, shortly after joining NTCA, Dr. Jenkins applied for medical-staff privileges at the Hospital.

Dr. Jack Barnett, then chief of the Hospital's department of medicine, initially opposed the application, purportedly due to Dr. Jenkins' omission of an unsatisfactory item in his medical-training history. When Dr. Barnett's opposition failed to persuade his approval-process colleagues, however, he gave Dr. Jenkins' application his support. Upon being granted staff privileges at the Hospital in late 1998, Dr. Jenkins began working in the cardiac catheterization laboratory (cath lab), where he performed, inter alia, primary angioplasty.

The administrative director of the cardiology department testified by deposition that, starting approximately six months after Dr. Jenkins arrived, cath-lab employees communicated to her they felt they were working in a hostile environment. As a result, in mid-2000, she requested a meeting with the cath-lab staff, a human-resources vice president, and the newly-assigned administrator for cardiology. Following that meeting on 12 July, the cardiology administrator: met with Dr. Robert Edmonson, then director of cardiology, and Dr. Barnett, among others; and formed an ad hoc committee to determine whether he should be subject to corrective action.

That committee interviewed a number of cath-lab staff members, cardiology-section members, hospital administrators, and Dr. Jenkins. As stated in a committee document, the committee: concluded "there [was] a hostile environment in the Cath Lab, which is potentially injurious to patient care", due in "large part" to Dr. Jenkins; and, on 21 July, recommended termination of his medical-staff membership and privileges.

The committee's recommendation was forwarded to the corporate medical board (Board). On 25 July, after meeting that day with Dr. Jenkins, the Board summarily suspended Dr. Jenkins' cath-lab privileges, pending further review.

On 27 July, after further review of the evidence related to Dr. Jenkins' cath-lab conduct, however, the Board recommended that Dr. Jenkins retain his staff membership and privileges *under certain conditions*, such as his acknowledging he created a hostile environment in the cath lab and apologizing both in writing and in person to the cath-lab employees, agreeing to undergo psychiatric evaluation and ongoing counseling from a psychiatrist selected by the Board, and agreeing to the monitoring of his cath-lab behavior for an indefinite period of time by a committee recommended by the Board. Dr. Jenkins agreed to all of the conditions, except evaluation by a Board-chosen psychiatrist; he requested choosing his own.

Accordingly, on 23 August, Dr. Jenkins requested further review by a fair-hearing committee of the medical staff. And, on 7 September, the above-described summary suspension was reported to the national practitioner data bank (NPDB).

Following a hearing in December 2000 and January 2001, the fair-hearing committee unanimously disagreed with Dr. Jenkins' summary suspension and, on 5 February 2001, recommended petitioning the NPDB to void the adverse recommendation. Upon receipt of the fair-hearing committee's report, the Board made a final recommendation on 20 February to reinstate Dr. Jenkins' cath-lab privileges, to establish a monitoring committee, and to petition the NPDB to void the adverse recommendation. In sum, Dr. Jenkins' suspension lasted approximately seven months.

In this action, Dr. Jenkins presented numerous federal and state-law claims against the Hospital. Only one is on appeal: under § 1981, for racial discrimination impairing his ability to make or enforce contracts.

The district court granted summary judgment in favor of the Hospital. For the § 1981 claim at issue, the court held: there was no contract in the record to form the basis of a § 1981 claim; and, even if there were, Dr. Jenkins failed to create a genuine issue of material fact on whether the Hospital had the intent to discriminate against him on the basis of race. ***Jenkins v. Methodist Hosps. of Dallas, Inc.***, No. 3:02-CV-1823-M, 2004 WL 3393380 (N.D.Tex. Aug. 14, 2004).

Dr. Jenkins' brief in opposition to summary judgment contained a misstatement in quoting a comment, according to Dr. Jenkins, made to him by Dr. Barnett. Accordingly, pursuant to the show-cause procedure for *sua sponte* sanctions under Rule 11, the court imposed public-reprimand sanctions against Dr. Jenkins' attorney in an opinion. ***Jenkins v. Methodist Hosps. of Dallas, Inc.***, No. 3:02-CV-1823-M, 2004 WL 2871006 (N.D.Tex. Dec. 14, 2004).

II.

The § 1981 and sanctions issues are addressed in turn. For the former, Dr. Jenkins failed to show a material fact issue concerning claimed racial discrimination. For the latter, the district court did not abuse its considerable discretion.

A.

A summary judgment is reviewed de novo, applying the same standard as the district court. *E.g.*, ***Wheeler v. BL Dev. Corp.***, 415 F.3d 399, 401 (5th Cir.), *cert. denied*, --- U.S. ----, 126 S.Ct. 798, 163 L.Ed.2d 627 (2005). Summary judgment is appropriate if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). "We resolve doubts in favor of the nonmoving party and make all reasonable inferences in favor of that party." ***Dean v. City of Shreveport***, 438 F.3d 448, 454 (5th Cir.2006). No genuine issue of material fact exists if the summary-judgment evidence is such that no reasonable juror could find in favor of the nonmovant. *E.g.*, ***Mayberry v. Vought Aircraft Co.***, 55 F.3d 1086, 1089 (5th Cir.1995).

Section 1981 provides: "All persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens". 42 U.S.C. § 1981. Section 1981 claims are analyzed under the same framework as Title VII claims. ***Roberson v. Alltel Info. Servs.***, 373 F.3d 647, 651 (5th Cir.2004).

To defeat summary judgment, Dr. Jenkins was required, inter alia, to show a genuine issue of material fact. The following sub-issues concern the underlying process for determining whether he made that material-fact-issue showing.

First, Dr. Jenkins had to establish a prima facie case of intentional discrimination. ***Bellows v. Amoco Oil Co.***, 118 F.3d 268, 274 (5th Cir.1997). He had to show: (1) he is a member of a racial minority; (2) the Hospital had the intent to discriminate against him on the basis of race; and (3) the discrimination concerned the making or enforcement of a con-

tract. ***Id.*** Upon Dr. Jenkins' making this showing, the Hospital was required to articulate a legitimate, non-discriminatory reason for the summary suspension. *E.g.*, ***Rachid v. Jack in the Box, Inc.***, 376 F.3d 305, 312 (5th Cir.2004). The burden then shifted to Dr. Jenkins to show: either the proffered reason was not true, but rather a pretext for discrimination; or the reason, although true, was only one reason for the suspension, and Dr. Jenkins' race was another motivating factor. ***Id.*** To meet the motivating-factor prong, Dr. Jenkins had to show his race " 'actually played a role in [the Hospital's decision-making] process and had a determinative influence on the outcome' ". ***Reeves v. Sanderson Plumbing Prods., Inc.***, 530 U.S. 133, 141, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (quoting ***Hazen Paper Co. v. Biggins***, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)). Throughout the burden shifting, Dr. Jenkins had the ultimate burden of showing a genuine issue of material fact on whether the Hospital intentionally discriminated against him on the basis of race. *See* ***id.*** at 143, 120 S.Ct. 2097.

Dr. Jenkins claims: by summarily suspending his cath-lab privileges for seven months and reporting this action to the NPDB, the Hospital intentionally discriminated against him and thereby interfered with the making or enforcement of his contracts with the NTCA, patients needing angioplasty, and a different hospital at which he wanted to acquire staff privileges. (Because Dr. Jenkins contends the suspension of his cath-lab privileges and report to the NPDB interfered with his ability to make and enforce contracts, we first examine whether those actions were racially discriminatory. If they were not, we need not determine whether each defendant separately engaged in racially discriminatory conduct.) The Hospital responds that the alleged contracts cannot form the basis for a § 1981 claim. In the alternative, it contends: the suspension was due, not to racial animus, but to concern that Dr. Jenkins was creating a hostile environment in the cath lab which could potentially result in a lower standard of patient

care; and it was legally required to report the action to the NPDB.

Essentially for the reasons stated in the district court's extremely detailed and well-reasoned opinion, and assuming Dr. Jenkins made a *prima facie* case of discrimination, he failed to show the requisite material fact issue on whether the Hospital's proffered reason for suspending his staff privileges pending investigation of the alleged hostile-working environment was not legitimate and non-discriminatory. Accordingly, we need not reach the question of whether the Hospital's actions interfered with his making or enforcement of a contract.

The primary evidence relied upon by Dr. Jenkins for the asserted reason for the suspension's being pretextual and racial bias' being another motivating factor for the Hospital's actions is 11 alleged remarks by individuals affiliated with the Hospital.

> [I]n order for comments in the workplace to provide sufficient evidence of discrimination, they must be "(1) related [to the protected class of persons of which the plaintiff is a member]; (2) proximate in time to the [complained-of adverse employment decision]; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue".

Patel v. Midland Mem'l Hosp. & Med. Ctr., 298 F.3d 333, 343-44 (5th Cir.2002) (alterations in original) (quoting ***Rubinstein v. Adm'rs of Tulane Educ. Fund***, 218 F.3d 392, 400-01 (5th Cir.2000)).

Dr. Jenkins attributes several of the alleged remarks to Dr. Barnett. As a participant both on the ad hoc committee that initially recommended suspension of Dr. Jenkins' cath-lab privileges and in the Board's review of this recommendation, Dr. Barnett was obviously in a position to influence the decision to suspend Dr. Jenkins. Although Dr. Barnett's alleged

remarks about Dr. Jenkins reflect a mistrust of him and his professional capabilities, none shows the requisite racial animus towards him. Dr. Barnett's other alleged remarks were either *not* made in reference to blacks and/or occurred many years prior to Dr. Jenkins' suspension.

The remaining five alleged remarks attributed to persons other than Dr. Barnett likewise do *not* meet Dr. Jenkins' summary-judgment burden. One involved the "probable" use of a racial epithet in reference to Dr. Jenkins off hospital grounds by two individuals, one of whom was a *witness* before the ad hoc committee. This singular alleged remark is insufficient to show the committee's actions were motivated by racial bias. Dr. Jenkins has provided no evidence that witness either wielded power over the committee members or provided inaccurate information the committee relied upon without conducting an independent investigation. *See* ***Long v. Eastfield Coll.***, 88 F.3d 300, 307 (5th Cir.1996). Another alleged remark did *not* involve blacks, while another involved a black speaker, neither of which suggests the Hospital's reason was pretextual or motivated by racial bias against blacks. The final two comments were simply opinions, with *no* supporting evidence, that Dr. Jenkins was resented in the cath lab and suspended because he was black.

Dr. Jenkins also asserts that a number of other actions by the Hospital indicate its racial motivation, including: the Hospital's failure to call his attention to the cath-lab problem prior to beginning the peer-review process; the claimed bad faith with which the ad hoc committee conducted that review; affidavits showing the claims about his behavior were false; the "gratuitous severity" of his summary suspension; the Board's refusal to negotiate with him regarding the conditions for reinstatement of his privileges; and the unanimous rejection of the charges against him.

The underlying evidence for these assertions, however, does *not* show a genuine issue of material fact on whether the Hospital's summary suspension of Dr. Jenkins was racially

motivated. That evidence shows the ad hoc committee was formed only after the administrative director of the cardiology department received numerous complaints about Dr. Jenkins' professionalism in the cath lab and called meetings to try to resolve the discord. The rejection of the committee's suspension recommendation does not create a material fact issue whether its actions were racially motivated. ***Bryant v. Compass Group USA Inc.***, 413 F.3d 471, 478 (5th Cir.2005) ("[E]vidence that the employer's investigation merely came to an incorrect conclusion does not establish a racial motivation behind an adverse employment decision".), *cert. denied*, --- U.S. ----, 126 S.Ct. 1027, 163 L.Ed.2d 855 (2006). Under § 1981, courts are charged only with determining whether such actions were racially discriminatory; where they are not shown to be, courts cannot second-guess the bases for them. ***Id.***

B.

For the companion appeal, Donald H. Flanary, Jr. (Jenkins' attorney) challenges the district court's *sua sponte* sanctioning his conduct under Rule 11. In opposition to the Hospital's summary-judgment motion, Jenkins' attorney filed both a response and a supporting brief on 4 November 2003. In presenting the racial discrimination claims, the brief quoted from Dr. Jenkins' affidavit (which was filed with that brief after being signed and notarized at Jenkins' attorney's law firm on the very day the brief was signed).

Dr. Jenkins stated in his affidavit: Dr. Barnett said to him "he [Dr. Barnett] would not let me [Dr. Jenkins] treat his dog". The brief, however, quoted the statement as "Boy, I would not let you treat my dog", wrongly inserting the racially-charged word "Boy" at the beginning of the statement.

Opposing counsel immediately discovered the glaring misstatement and pointed it out in their 19 November 2003 reply brief. Jenkins' attorney, however, did not correct this misrepresentation until almost two months later, upon being ques-

tioned about it by the district court at a 13 January 2004 summary-judgment hearing. Jenkins' attorney apologized for the misrepresentation and offered to resubmit the brief with the quotation corrected.

The district court rejected the request and found the conduct "unacceptable" because it changed a comment from one which "on its face has absolutely nothing to do with race" to one that, "was, in fact, racially related". The district court admonished Jenkins' attorney for "put[ting] before the Court a false piece of evidence" and directed him to submit affidavits explaining his and his firm's actions in that regard.

Subsequently, in its 18 August 2004 opinion granting summary judgment, the district court issued a show-cause order to Jenkins' attorney, specifying the conduct at issue. After reviewing the response to that order, the court in a December 2004 opinion held Jenkins' attorney in violation of Rule 11(b)(3) (allegations and factual contentions must have evidentiary support) "for his unprofessional conduct in not verifying the accuracy of the alleged quotation and in not promptly withdrawing it when the error was pointed out in Defendants' Reply Brief". ***Jenkins***, 2004 WL 2871006, at *2. The court sanctioned him through a public reprimand in the opinion. ***Id.***

In claiming the sanctions were unwarranted, Jenkins' attorney maintains the statement at issue was an inadvertent mistake and not the result of serious misconduct. Rule 11 sanctions are reviewed for an abuse of discretion. ***Whitehead v. Food Max of Miss., Inc.***, 332 F.3d 796, 802 (5th Cir.2003) (en banc). As noted in Whitehead, this standard is "necessarily very deferential" for two reasons:

> First, based on its familiarity with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11. Second, the district judge is independently responsible for main-

> taining the integrity of judicial proceedings in his court and, concomitantly, must be accorded the necessary authority.

Id. at 802-03. (internal citations and quotation marks omitted).

Rule 11 is designed to "reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of attorneys and reinforcing those obligations through the imposition of sanctions". ***Thomas v. Capital Sec. Servs., Inc.***, 836 F.2d 866, 870 (5th Cir.1988) (en banc). Along that line, attorneys certify to the best of their knowledge that "allegations and other factual contentions [submitted to the court] have evidentiary support". FED.R.CIV.P. 11(b)(3).

For obvious reasons, the procedure for sanctions imposed sua sponte differs from when requested by counsel. *Compare* FED. R. CIV. P. 11(c)(1)(A) *with* 11(c)(1)(B). If, after notice and a reasonable opportunity to respond, the court determines Rule 11 sanctions may be warranted, it may *sua sponte* issue a show-cause order specifying the offending conduct and, following a response, may impose sanctions. FED.R.CIV.P. 11(c)(1)(B), (c)(3).

As hereinafter discussed, "the standard under which the attorney is measured [under Rule 11] is an objective, not subjective, standard of reasonableness under the circumstances". *Whitehead*, 332 F.3d at 802 (quoting ***Childs v. State Farm Mut. Auto. Ins. Co.***, 29 F.3d 1018, 1024 (5th Cir.1994) (emphasis added)). Accordingly, an attorney's good faith will not, by itself, protect against the imposition of Rule 11 sanctions. ***Childs***, 29 F.3d at 1024.

Concerning this objective standard, Jenkins' attorney claims: where, as here, sanctions are imposed *sua sponte*, the standard should instead be whether he acted in *subjective* bad faith, akin to being in contempt of court. He bases this on his not having the 21-day safe-harbor provision he would have had to correct the error under Rule 11(c)(1)(A) for sanctions

requested by counsel. *E.g.*, ***In re Pennie & Edmonds LLP***, 323 F.3d 86 (2d Cir.2003).

In this regard, the sanctions imposed in ***Whitehead*** and ***Childs*** were pursuant to counsel's motion. The sanctions imposed in ***Childs*** were under the Rule as amended in 1983, which permitted *sua sponte* sanctions. The amendment in 1993 concerning such sanctions simply added the above-described show-cause procedure. *See* Advisory Committee Notes on FED.R.CIV.P. 11 (1993 Amendments). The rule as amended in 1993 was at issue in ***Whitehead***. That opinion makes no distinction between the initiating basis by which sanctions are being considered.

Admittedly, this distinction was *not* at issue in ***Whitehead***; but, obviously, the reasons for our abuse-of-discretion standard of review being "necessarily very deferential" are as applicable to sua sponte sanctions as to those imposed on motions by counsel. Nor is there any basis for making a distinction based on who initiates the sanctions inquiry. Ultimately, unless the safe-harbor provision is utilized for sanctions requested by counsel, the district court must decide whether to impose them. In each instance, the party subject to sanctions is given the opportunity to show why they should not be imposed.

Accordingly, ***Whitehead*** and ***Childs*** are controlling; they require an objective standard. *See also* ***Young v. City of Providence ex rel. Napolitano***, 404 F.3d 33, 38-40 (1st Cir.2005); ***Kaplan v. DaimlerChrysler, A.G.***, 331 F.3d 1251, 1255 (11th Cir.2003). In the alternative, Jenkins' counsel maintains sanctions were improper under an objective standard.

In response to the show-cause order, Jenkins' attorney provided the following: An associate in his law firm assumed primary responsibility for drafting the section of the brief containing the misstatement. (On two instances earlier, in the response and supporting brief, the statement was quoted cor-

rectly.) The brief was then reviewed by two partners in the firm who checked, among other things, all quotations for accuracy and added supporting record citations. Jenkins' attorney then proofread the brief. Despite these internal-review procedures, the error remained. As noted, approximately two weeks after the brief was filed, the error was brought to Jenkins' attorney's attention by opposing counsel's reply brief.

Of course, Jenkins' attorney does *not* contest either the district court's finding the statement at issue false or that he was responsible because he signed the brief. Instead, he claims an isolated factual error should not be the basis of Rule 11 sanctions. Under certain circumstances, however, an isolated factual misrepresentation may serve as the basis for them. *See, e.g.*, ***Precision Specialty Metals, Inc. v. United States***, 315 F.3d 1346, 1357 (Fed.Cir.2003) (affirming a sanction for miscitation and mischaracterization of authority "because, in quoting from and citing published opinions, [counsel] distorted what the opinions stated by leaving out significant portions of the citations or cropping one of them, and failed to show that she and not the court had supplied the emphasis in one of them").

As stated by the Advisory Committee Note to Rule 11, a lawyer is required to " 'stop-and-think' before ... making legal or factual contentions". Advisory Committee Notes on FED.R.CIV.P. 11 (1993 Amendments). Needless to say, this duty is an extremely important one, especially for the situation at issue. As the district court stated, the "erroneous inclusion of the word 'boy' in the statement ... if relied upon by the Court, could have altered the outcome of th[e] ... case". ***Jenkins***, 2004 WL 2871006, at *2. *See also* ***Aman v. Cort Furniture Rental Corp.***, 85 F.3d 1074, 1083 (3d Cir.1996) (holding racially-charged "code words" may provide the basis of discriminatory intent by "send[ing] a clear message and carry[ing] the distinct tone of racial motivations and implications").

"Whatever the ultimate sanction imposed, the district court should utilize the sanction that furthers the purposes of Rule 11 and is the least severe sanction adequate to such purpose." ***Thomas***, 836 F.2d at 878. For example, an admonition by the court may be an appropriate sanction, in instances where the attorney's sanctionable conduct was not intentional or malicious, where it constituted a first offense, and where the attorney had already recognized and apologized for his actions. *E.g.*, ***In re Kelly***, 808 F.2d 549, 552 (7th Cir.1986) (issuing a formal warning because "the [offending paper] was clumsily rather than dishonestly drafted, and ... counsel ha[d] ... acknowledged [the deficiency] ... and has assured us that [he] will not in the future make inadequately substantiated statements in court filings"); *see also* ***Traina***, 911 F.2d at 1158. On the other hand, sanctions should be "sufficient to deter repetition of [similar] conduct". FED. R. CIV. P. 11(c)(2).

As the district court noted, the erroneous, racially-charged quotation should have been discovered through simple proofreading. Moreover, as the court noted, even though the error was pointed out by opposing counsel in November 2003, Jenkins' attorney did not correct it until January 2004, roughly two months later, at the summary-judgment hearing.

Jenkins' attorney contends the court's delayed-correction statement in its opinion was one of the two bases for sanctions and that such a basis violated our court's "snapshot" rule, which "ensures that Rule 11 liability is assessed only for a violation existing at the moment of filing". ***Skidmore Energy, Inc., v. KPMG***, 455 F.3d 564, 570 (5th Cir.), *cert. denied*, --- U.S. ----, 127 S.Ct. 524, 166 L.Ed.2d 371 (2006). It is not clear whether it was a basis, or simply a factor that resulted in not mitigating against sanctions. In any event, such reliance on this "snapshot" rule is inapposite; the district court had already concluded the filing never satisfied Rule 11 to begin with, a fact never contested by Jenkins' attorney. *See generally* ***id.*** (sanctions upheld on similar grounds). Moreover, at most, this was but one of two bases relied upon in

imposing sanctions, the other, as quoted above, being the attorney's "unprofessional conduct in not verifying the accuracy of the alleged quotation". ***Jenkins***, 2004 WL 2871006, at * 2. Therefore, although Jenkins' attorney did not have a continuing duty to correct the misrepresentation, *see* ***Edwards v. Gen. Motors Corp.***, 153 F.3d 242, 245 (5th Cir.1998), his promptly doing so might have been considered by the district court as a mitigating factor. Jenkins' attorney did not take that obvious, and most appropriate, opportunity.

Pursuant to our quite deferential standard of review for sanctions, we are extremely mindful that district courts are "on the front lines of litigation". ***Cooter & Gell v. Hartmarx Corp.***, 496 U.S. 384, 404, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). As the district court noted, the error was glaring and could have had a serious impact on its summary-judgment decision. The court did not abuse its discretion in imposing the public-reprimand sanctions.

III.

For the foregoing reasons, the judgment and sanctions are

AFFIRMED.

APPENDIX B

[Filed Aug. 18, 2004]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

G. MARK JENKINS, M.D.	§	
	§	
Plaintiff,	§	
v.	§	
METHODIST HOSPITALS	§	3:02-CV-1823-M
OF DALLAS, INC.,	§	**FILED UNDER SEAL**
HOWARD CHASE, KIM	§	
HOLLAND, JOHN	§	
HAUPERT, JACK	§	
BARNETT, KELLY	§	
WOLFE, AND TIM MEEKS,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

For the reasons stated herein, the Court grants all remaining Defendants summary judgment on all claims remaining in this case.

I. BACKGROUND

Plaintiff G. Mark Jenkins, M.D., filed this suit against Methodist Hospitals of Dallas, Inc., Howard Chase, Kim Hollon, John Haupert, Jack Barnett, Kelly Wolfe, and Tim Meeks for claims arising out of a peer review that resulted in the summary suspension of Dr. Jenkins's cardiac catheterization laboratory ("cath lab") privileges for approximately seven months in 2000 and 2001.

Dr. Jenkins is an African-American cardiologist who joined the North Texas Cardiovascular Association ("NTCA") in 1998, which had a contractual relationship with Methodist to provide cardiac services to Methodist patients. Dr. Jenkins then applied for medical staff privileges at Methodist.

Jack Barnett, M.D., as then Chief of Methodist's Department of Medicine, initially opposed Dr. Jenkins's application. According to Robert E. Edmonson, M.D.,FN1[1] then Director of Cardiology, Dr. Barnett "claimed that Dr. Jenkins was trying to hide a portion of his medical training history and based on a telephone call to a physician at Emory, he apparently concluded that Dr. Jenkins should be denied privileges." (Pl.App. at 652). The dispute over the allegedly "hidden" portion of Dr. Jenkins's medical training history related to Dr. Jenkins's failure to include on his application for medical staff privileges the one year that Dr. Jenkins spent in a fellowship program at Emory University. (Def.App. at 15). Dr. Jenkins describes the one year at Emory as follows: "[N]either I nor Emory were satisfied with each other and we both took steps, prior to my leaving Emory, toward an alternative course of study." (Pl.App. at 701). Dr. Barnett, on the other hand, characterized the one year as "a very unsatisfactory situation" and thus attributed Dr. Jenkins's omission of Emory to dishonesty. (Def.App. at 245-46). According to Dr. Edmonson, Dr. Barnett additionally warned against granting Dr. Jenkins's application: "[Y]ou will never get rid of him." (Pl.App. at 652). Finally, according to Dr. Jenkins, "[Dr. Barnett] attempted to run me off by telling me that he would not let me treat his dog." (Pl.App. at 702). Despite Dr. Barnett's initial opposition to Dr. Jenkins's application, Dr. Jenkins's application was approved in November of 1998. According to Dr. Barnett, after

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[1] Dr. Edmonson's name is spelled numerous ways throughout the briefing and the record. The Court chooses this spelling in the hopes that it is accurate. See Pl.App. at 651 ("Robert E. Edmonson, M.D."); Pl.App. at 433 ("Bob Edmundson, M.D.").

it became clear that other participants in the approval process were unconvinced by Dr. Barnett's opposition, Dr. Jenkins's "*application got full support from me [Dr. Barnett] and everyone else at that point on.*" (Def.App. at 245).

Upon being granted medical staff privileges, Dr. Jenkins began working in the cath lab, performing primary and acute angioplasty. According to Dr. Jenkins, as a result of the performance of these intense procedures, the cath lab staff was "required to work harder and longer than before." (Pl.App. at 702). Further, according to Dr. Jenkins, the cath lab staff was poorly trained, thus leading to "extreme frustration" on the part of Dr. Jenkins and the staff. (Pl.App. at 702).

According to Pam Daniel, the administrative director of the cardiology department, employees communicated to her that "they felt like they were working in a hostile environment," starting "six months approximately after Dr. Jenkins arrived." (Def.App. at 264). Four written complaints were filed against Dr. Jenkins. First, in early May 1999, Lu Ann Bretton,FN2[2] a nurse who was working in the cath lab, accused Dr. Jenkins of physically intimidating her during a procedure. Dr. Jenkins denied the accusation. (Pl.App. at 704). After his investigation of the incident, Dr. Edmonson "could find nothing that supported [Ms. Bretton's] version of what happened" and "concluded her claim was without merit." (Pl.App. at 652-53).

Second, on May 21, 1999, Kelly Wolfe, who had recently joined the cath lab as a technician after working as a Flight Paramedic, submitted a letter complaining of Dr. Jenkins's treatment of him. (Def.App. at 33-34). According to Dr. Jenkins, "no one ever said anything to [him] regarding any complaint Mr. Wolfe may have had." (Pl.App. at 705). Further,

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[2] Ms. Bretton's name is spelled numerous ways throughout the briefing and the record. The Court chooses this spelling in the hopes that it is accurate. See Pl.App. at 102 ("Sharon Louann Breton"); Pl. Resp. at 8 ("Lou Ann Breton"); Def. Br. at 9 ("Lu Ann Bretton").

Dr. Jenkins stated that he "had complained throughout Mr. Wolfe's employment in the cath lab that he was incompetent and when, in fact, he was promoted to Shawn Tillman's position after she resigned, I vigorously opposed this promotion." (Pl.App. at 706).

Third, on May 25, 1999, Juan Vazquez, a Methodist employee, submitted a written complaint that Dr. Jenkins made a rude comment about Mr. Vazquez's speaking Spanish to his fellow workers, made a comment about Mr. Vazquez's hair that could arguably be interpreted as an ethnic slur, and threatened him. (Def.App. at 60-61). Mr. Vazquez now states: "I believe that while my comments were true in May 1999 they did not reflect Dr. Jenkins [sic] true feelings and are being misconstrued.... I do not consider what Dr. Jenkins said to me to be a racial slur." (Pl.App. at 639).

Fourth, on May 15, 2000, Robert Almes, a cath lab employee, submitted a written complaint about Dr. Jenkins's requirements for the positioning of the handle that controlled the movement of the catheterization table. (Def.App. at 64). The Methodist Hospital Human Resources department characterized the complaint as alleging "sexual harassment" and, after investigating the complaint, "concluded that the complaint is not meritorious." (Def.App. at 65).

On July 12, 2000, a meeting was held with all of the cath lab staff, which was attended by Tim Meeks, Human Resources Vice President, and John Haupert, the administrator newly assigned responsibility for the cardiology area. Ms. Daniel says she requested the meeting for the following reason: "It was at a point where the employee complaints had begun to escalate again. I had already been speaking with my two prior direct reports.... At this point, I had a new direct report, John Haupert. And out of lack of knowing what else to do, I felt like someone else in the organization needed to hear what I had been hearing from my employees for some time to offer suggestions and/or guidance to me and the staff." (Def.App. at 266-67). Mr. Haupert took notes of the concerns

expressed by the cath lab staff at the meeting. (Pl.App. at 589-593).

Dr. Edmonson says that, after Mr. Haupert's meeting with the cath lab staff, Mr. Haupert summoned him to a meeting with Dr. Barnett, Kim Hollon, and others. (Pl.App. at 654). According to Dr. Edmonson, that meeting led to the commencement of the peer review process against Dr. Jenkins: "Mr. Haupert explained that he had a meeting with the cath lab staff and they were very upset at Dr. Jenkins, that something had to be done immediately or the Hospital would be losing staff. He did not indicate any exceptions to this position among the cath lab personnel. Dr. Barnett stated at the meeting that Dr. Jenkins should be suspended without further review. The recommendation was made to begin the peer review process." (Pl.App. at 654).

On July 14, 2000, Dr. Barnett requested that, pursuant to Article 7 of the Bylaws, Kirk Lipscomb, M.D., Chair of the Corporate Medical Board, authorize him to appoint an ad hoc committee to determine whether Dr. Jenkins should be subject to corrective action. Article 7 of the Bylaws provides for the appointment of an ad hoc committee "[w]henever the activities or professional conduct of any practitioner with clinical privileges are considered to be lower than the standards or aims of the medical staff or to be disruptive to the operations of the hospital." (Pl.App. at 491). On the same day, Dr. Lipscomb directed Dr. Barnett to arrange for an ad hoc investigating committee "to study the matter concerning the professional conduct of Dr. Jenkins," "to extend an opportunity to Dr. Jenkins to discuss the concerns which led to this action," and to make a "report of its investigation to the Corporate Medical Board within 30 days." (Pl.App. at 528). Also on the same day, Dr. Barnett appointed an ad hoc committee of five members, including Darrell Thigpen, M.D., and Freda Levy, M.D. Dr. Jenkins contends that the appointment of Dr. Levy was improper because Mr. Haupert's notes from the July 12, 2000 meeting with the cath lab included the following al-

legation: "During a case in the cath lab, Dr. Jenkins stated that the nephrologists, in particularly [sic] Dr. Levy, are worthless." (Pl.App. at 594).

The ad hoc committee convened on the morning of July 17, 2000. (Pl.App. at 706). According to Dr. Jenkins's affidavit, Mr. Haupert presented the case against Dr. Jenkins. (Pl.App. at 706). Then, on July 18, 2000, the ad hoc committee, together with Mr. Haupert, interviewed Walter Barry,[3] Kelly Wolfe, Joseph McDonnell,[4] and Lu Ann Bretton. (Pl.App. at 353). According to Dr. Jenkins, he did not learn that an ad hoc committee had been convened until July 19, 2000. (Pl.App. at 706). On July 19, 2000, the panel met with Dr. Lipscomb, Dr. Edmonson, and Dr. David Levin. (Pl.App. at 433).

In a letter to Dr. Jenkins dated July 19, 2000, Dr. Barnett explained that the complaints against Dr. Jenkins "allege demeaning comments to the staff, berating the staff, threatening the staff with loss of employment, and other disruptive behavior." (Def.App. at 100). The letter also confirms that Dr. Jenkins had agreed to meet with the committee on July 20, 2000 at 7:00 a.m. (Def.App. at 100). According to Dr. Jenkins, he appeared before the ad hoc committee on July 20, 2000 with "no knowledge of the allegations against [him] and with less than twenty-four hours' time to prepare." (Pl.App. at 706). Further, according to Dr. Jenkins, because none of the allegations were true, it would have been impossible for him to admit any of the allegations. (Pl.App. at 706). Dr. Jenkins recommended that the ad hoc committee discuss the allegations

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[3] Mr. Barry's name is spelled differently throughout the briefing and the record. The Court chooses this spelling in the hopes that it is accurate. See Pl.App. at 353 ("Walter Berry"); Pl.App. at 642 ("Walter Barry").

[4] Mr. McDonnell's name is spelled differently throughout the briefing and the record. The Court chooses this spelling in the hopes that it is accurate. See Pl. Resp. at 12 ("Mr.McDonald"); Def.App. at 102 ("Joseph McDonnell").

with Shawn Tillman, the former cath lab supervisor, and the ad hoc committee did so on July 21, 2000. In her affidavit, Ms. Tillman states that Dr. Jenkins has never created an environment in which patient health or safety would be endangered, and characterizes her testimony before the ad hoc committee as follows: "At the meeting, the Ad Hoc Committee asked me about Dr. Jenkins's general behavior, but I do not recall anyone asking me about any specific conduct or instances of patient endangerment. As I have always done, I gave my truthful opinion of Dr. Jenkins at that meeting." (Pl.App. at 618).

On July 21, 2000, the ad hoc committee made the following findings:

> The Committee is disturbed by the actions and behavior described by Cath Lab employees. The Committee feels there is a hostile environment in the Cath Lab, which is potentially injurious to patient care. Dr. Jenkins bears a large part of the responsibility for the environment although he does not acknowledge it. The Committee is seriously concerned with his ability to perceive the implications of his actions and to understand criticism. This appears to impair his ability to grow as a physician and to function as the leader of the healthcare team. The Committee does not feel that the situation is correctable.

(Def.App. at 162).

Then, the committee recommended that "Dr. Jenkins' medical staff membership and privileges be terminated." (Def.App. at 162). According to Dr. Thigpen, the vote of the ad hoc committee was three to two. (Pl.App. at 137). Dr. Jenkins contends that the appointment of Dr. Levy was significant because Dr. Levy was one of the three members who voted to terminate Dr. Jenkins's privileges; however, the portion of the record cited by Dr. Jenkins for this proposition does not identify which members voted to terminate Dr. Jenkins's privi-

leges. (Pl.'s Resp. at 12; Pl.App. at 137). Defendants contest the characterization of the ad hoc committee's vote as divided, citing the committee's final recommendation, which states that a "consensus was reached."

The ad hoc committee's recommendation was forwarded to the Corporate Medical Board (the "CMB"), which scheduled a meeting for July 25, 2000 at 6:00 p.m. (Def.App. at 163). In a letter dated July 24, 2000, Dr. Barnett notified Dr. Jenkins of the upcoming CMB meeting and his right to participate: "If you wish to attend the July 25th Corporate Medical Board meeting, you must contact Karen Hunter in the Medical Staff Office by 4:00 p.m. Tuesday, July 25, 2000 so that time can be set aside for your attendance and presentation. If you decide not to take advantage of this opportunity to discuss the charges against you, the Corporate Medical Board will make its decision based on information made available to it by the Department Ad Hoc Investigating Committee."

The CMB met on July 25, 2000. The CMB heard from Dr. Barnett and Mr. Haupert about how the investigation into Dr. Jenkins was initiated, reviewed the ad hoc committee's recommendation, and heard from Dr. Jenkins. (Def.App. at 164-168). The CMB was provided with transcripts from the ad hoc committee's meetings, except for the testimony of Ms. Tillman, whose testimony was not transcribed. (Def.App. at 167). Then, the CMB unanimously approved a motion to summarily suspend Dr. Jenkins's cardiac catheterization laboratory privileges, pending further review. (Def.App. at 168). On July 26, 2000, Dr. Barnett notified Dr. Jenkins via letter that his cath lab privileges had been summarily suspended pursuant to Article VII, Section 7.1.2(1) of the Medical Staff Bylaws, which provides:

> Whenever a practitioner's conduct requires that immediate action be taken to protect the life of any patient(s) or to reduce the likelihood of injury or damage to the health or safety of any patient, employee or other person present in the hospital, the chairman of the executive

> committee, the chairman of the respective clinical department, or the executive director shall each have the authority to summarily suspend the privileges of a practitioner. Such a summary suspension shall become effective immediately upon imposition.

(Def.App. at 169).

The CMB met again on July 27, 2000. (Def.App. at 171). The CMB unanimously approved a recommendation that Dr. Jenkins's membership and privileges be terminated unless he complied with certain conditions, including agreeing to undergo psychiatric evaluation and ongoing counseling from a psychiatrist selected by the CMB and agreeing to the monitoring of his behavior and conduct in the cath lab by a monitoring committee for an indefinite period of time. (Def.App. at 172-73). The CMB also conditioned the reinstatement of Dr. Jenkins's cath lab privileges on his written agreement to the earlier stated conditions, written confirmation of his having made an appointment with the selected psychiatrist, and confirmation from the monitoring committee that it had met with him. (Def.App. at 173). In a letter dated July 28, 2000, Mr. Chase notified Dr. Jenkins of the CMB's recommendation and notified Dr. Jenkins of his right to request, within thirty days, a hearing by a panel. (Def.App. at 175).

In response, Dr. Jenkins made a counter-proposal, agreeing to undergo counseling with Jack Shaw (a specialist in dispute resolution) and agreeing to the involvement of a monitoring committee. Several members of the CMB discussed Dr. Jenkins's letter and decided that it was insufficient. (Def.App. at 182). Barney Cohen, Senior Vice President, Legal Affairs, notified Dr. Jenkins of this decision. (Pl.App. at 547). Upon further reflection, Dr. Lipscomb convened the CMB so that the entire body could consider whether Dr. Jenkins's counter-proposal was satisfactory. (Def.App. at 182-83). The CMB unanimously agreed to reject Dr. Jenkins's counter-proposal and reaffirm the CMB's earlier recommendation.

On September 7, 2000, Methodist reported Dr. Jenkins's summary suspension to the National Practitioners Databank. (Pl.App. at 558).

On August 23, 2000, Dr. Jenkins requested a hearing by a Fair Hearing Committee of the Medical Staff ("hearing panel") regarding the July 26, 2000 summary suspension of his cath lab privileges and the CMB's July 27, 2000 recommendation. (Pl.App. at 549-50). The hearing panel "spent approximately 34 hours involving testimony of 14 witnesses and reviewed 491 pages of documents related to the allegations." (Def.App. at 187). The hearing panel unanimously disagreed with the July 26, 2000 summary suspension of Dr. Jenkins's cardiac catheterization privileges, unanimously disagreed with the CMB's August 24, 2000 recommendation, and unanimously recommended that the National Practitioner Data Bank be petitioned to void the adverse recommendation. (Def.App. at 187).

On February 20, 2001, upon receipt of the hearing panel's report, the CMB unanimously made a final recommendation to reinstate Dr. Jenkins's cath lab privileges, to establish a monitoring committee, and to void the report to the National Practitioner Data Bank. (Def.App. at 192). In a February 28, 2001 letter, Mr. Chase notified Dr. Jenkins that the Board of Directors for Methodist had adopted the CMB's final recommendation. (Def.App. at 194). Dr. Jenkins's cath lab privileges were reinstated, his privileges at Methodist were not terminated, and a request was submitted to the National Practitioner Data Bank to void the prior report.

In his First Amended Complaint, Dr. Jenkins asserts numerous claims against Defendants. At the January 13, 2004 hearing on Defendants' Motion for Summary Judgment, the Court disposed of many of Plaintiff's claims. For the reasons stated on the record, the Court denied Plaintiff's request for declaratory judgment that the Texas Medical Practice Act and the Health Care Qualified Immunity Act are unconstitutional, and dismissed with prejudice Plaintiff's request for declara-

tory judgment that the Texas Medical Practice Act and the Health Care Qualified Immunity Act do not afford Defendants immunity. The Court dismissed with prejudice all claims asserted against Defendant Tim Meeks. (Hereinafter, the Court will use the term "Defendants" to reference all named Defendants except Tim Meeks.) For the reasons stated on the record, the Court granted Defendants' motion for summary judgment on the following claims: Title VII, the Texas Commission on Human Rights Act, the Texas Free Enterprise and Antitrust Act, defamation, intentional infliction of emotional distress, breach of contract, conspiracy, 42 U.S.C. § 1983, and 42 U.S.C. § 1985. The Court found as a matter of law that Mr. Chase, Mr. Haupert, and Mr. Hollon are immune from liability under the Texas Medical Practice Act and granted summary judgment on all state law claims with respect to those Defendants. The Court denied summary judgment to Mr. Wolfe, Dr. Barnett, and Methodist on their defense of immunity. The Court granted Methodist summary judgment on Plaintiff's negligent hiring/supervision claim to the extent it is premised on the hiring/supervision of Mr. Wolfe, but denied Methodist's motion for summary judgment on the negligent hiring/supervision claim to the extent it is premised on the hiring and supervision of Dr. Barnett. The Court granted summary judgment to Defendants on Plaintiff's claim for tortious interference with prospective business advantage to the extent it is premised on the refusal to furnish information about Dr. Jenkins to St. Paul Hospital but denied Defendants' motion for summary judgment to the extent the claim is premised on interference with the future medical practice of Plaintiff. The Court denied Defendants' motion for summary judgment on the tortious interference with contract claim to the extent it is based on Plaintiff's contract with the NTCA, but granted summary judgment for Defendants to the extent the claim is based on other contracts. At the January 22, 2004 hearing, the Court further granted all Defendants' summary judgment on Plaintiff's § 1981 claim.

Thus, the only claims remaining in this case are Plaintiff's negligent hiring/supervision claim against Methodist to the extent it is based on Dr. Barnett's participation in the peer review process, Plaintiff's tortious interference with NTCA contract claim against Methodist, Dr. Barnett, and Mr. Wolfe, and Plaintiff's tortious interference with prospective advantage claim (i.e., his future medical practice) against Methodist, Dr. Barnett, and Mr. Wolfe. Upon further consideration, the Court hereby grants Defendants summary judgment on all claims remaining in this suit.

First, the Court finds as a matter of law that Defendants Dr. Barnett and Methodist are immune from liability under the Texas Medical Practice Act for the alleged conduct of Dr. Barnett.[5] However, the Court finds that Plaintiff has presented sufficient evidence to allow a reasonable factfinder to find by clear and convincing evidence that Mr. Wolfe's alleged conduct was committed with malice, and therefore, the Court cannot find as a matter of law that Mr. Wolfe and Methodist are immune from liability under the Texas Medical Practice Act for the alleged conduct of Mr. Wolfe.

Second, the Court finds, under the Health Care Qualified Immunity Act, that Mr. Wolfe and Methodist are not subject to liability for damages under state law for the alleged conduct on which Plaintiff's claims are premised.[6]

Third, the Court finds that Plaintiff bas failed to present sufficient evidence to allow a reasonable jury to find that De-

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[5] The Court notes that this finding serves as an additional basis for the Court's earlier grant of summary judgment to Dr. Barnett and Methodist on Plaintiff's other state law claims, to the extent those claims were premised on Dr. Barnett's alleged conduct.

[6] The Court notes that, because Dr. Barnett, Mr. Chase, Mr. Haupert, and Mr. Hollon are similarly within the scope of persons protected by the Health Care Qualified Immunity Act, this ruling serves as an additional basis for the Court's grant of summary judgment on Plaintiff's state law claims as to those Defendants.

fendants intended to discriminate against Dr. Jenkins on the basis of race. This serves as an additional basis for the Court's earlier grant of summary judgment to Defendants on Plaintiff's § 1981 claim.

II. ANALYSIS

A. Summary Judgment Standard

Under FED.R.CIV.P. 56(c), summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that, as a matter of law, the movant is entitled to judgment. *Little v. Liquid Air. Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994). In a motion for summary judgment, the burden is on the movant to prove that no genuine issue of material fact exists. *Latimer v. Smithkline & French Laboratories*, 919 F.2d 301, 302 (5th Cir.1990). If the moving party meets this initial burden, then the burden shifts to the nonmovant, who must produce evidence establishing a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 321-22 (1986). Furthermore, if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he bears the burden of proof at trial, summary judgment is mandatory. *Id.* at 322-24. The record must be considered in the light most favorable to the nonmovant. *Harrison v. Byrd*, 765 F.2d 501, 504 (5th Cir.1985).

B. Texas Medical Practice Act

Defendants argue that the Texas Medical Practice Act (the "TMPA") provides them immunity from Plaintiff's non-civil rights claims. The TMPA states, in relevant part:

> (b) A cause of action does not accrue against a member, agent, or employee of a medical peer review committee or against a health care entity from any act, statement, determination or recommendation made, or act reported, without malice, in the course of medical peer review.

> (c) A person, medical peer review committee, or health care entity that, without malice, participates in medical peer review or furnishes records, information, or assistance to a medical peer review committee or the board is immune from any civil liability arising from that act.

TEX. OCC.CODE ANN. § 160.010(b) & (c) (Vernon 2003).

Therefore, in this case, the Court must first analyze the allegedly actionable conduct by Dr. Barnett, Mr. Wolfe, and Methodist to see if it falls within the scope of the TMPA. Plaintiff argues that Dr. Barnett engaged in the following conduct:

- requested that Dr. Lipscomb authorize him to appoint an ad hoc committee to determine whether Dr. Jenkins should be subject to corrective action
- appointed an ad hoc committee of five members, including Dr. Levy
- spoke to the CMB about how and why the investigation into Dr. Jenkins was initiated
- together with the other members of the CMB, voted to summarily suspend Dr. Jenkins's cath lab privileges, pending further review
- together with the other members of the CMB, agreed to continue the suspension of Dr. Jenkins's cath lab privileges until he complied with certain conditions, including agreeing to undergo psychiatric evaluation
- together with the other members of the CMB, approved a recommendation that Dr. Jenkins's membership and privileges be terminated unless he complied with certain conditions, including agreeing to undergo psychiatric evaluation
- together with the other members of the CMB, agreed to reject Dr. Jenkins's counter-proposal

All of the above alleged conduct by Dr. Barnett falls within the conduct described in TEX. OCC.CODE ANN. § 160.010(b)

& (c). Plaintiff argues that Mr. Wolfe engaged in the following conduct:

- made false allegations about Dr. Jenkins at the July 12, 2000 meeting of the cath lab staff
- made false allegations about Dr. Jenkins when he testified before the ad hoc committee, the transcript of which was considered by the CMB

All of the above alleged conduct by Mr. Wolfe falls within the conduct described in TEX. OCC.CODE ANN. § 160.010(c).

Finally, Methodist's potential liability for tortious interference with contract and tortious interference with prospective business advantage, as well as Methodist's potential liability for most of the other state law claims alleged in Plaintiff's First Amended Complaint, is premised on the doctrine of respondeat superior. Therefore, to the extent that the conduct of Methodist's alleged agents is within the scope of the TMPA, the conduct that Plaintiff seeks to impute to Methodist is similarly within the scope of the TMPA. *See Ching v. Methodist Children's Hosp.*, No. 07-02-0218-CV, 2003 WL 943740, at *6 (Tex.App.-Amarillo Mar. 10, 2003, pet. denied) (noting that, because a hospital can act only through its agents, a plaintiff's summary judgment evidence must show which agents introduced malice into the medical peer review process). The only remaining state law claim against Methodist that is not based on conduct within the scope of the TMPA is the negligent hiring/supervision claim premised on Methodist's allowing Dr. Barnett to participate in the peer review process. Therefore, the alleged conduct by Dr. Barnett, Mr. Wolfe, and Methodist, except for Methodist's hiring/supervision of Dr. Barnett, falls within the scope of the TMPA. Absent malice, Dr. Barnett, Mr. Wolfe, and Methodist are immune from liability for conduct within the scope of the TMPA. TEX. OCC.CODE ANN. § 160.010(b) & (c).

If the alleged conduct is within the scope of the TMPA, a presumption arises that the conduct was without malice and

that a cause of action does not accrue for that conduct. *Ching*, 2003 WL 943740, at *6; *Maewal v. Adventist Health Systems/Sunbelt, Inc.*, 868 S.W.2d 886, 893 (Tex.App.-Fort Worth 1993, writ denied). The plaintiff has the burden of proving that the alleged conduct was performed with malice. *Dallas Co. Med. Soc. v. Ubinas-Brache*, 68 S.W.3d 31, 40 (Tex.App.-Dallas 2001, pet. denied); *Maewal*, 868 S.W.2d at 893. A defendant is entitled to summary judgment on the basis of immunity unless the plaintiff provides sufficient evidence to raise a fact issue about whether the defendant acted with malice. *See Poliner v. Tex. Health Sys.*, No. 3:00-CV-1007-P, 2003 WL 22255677, at *15 (N.D.Tex. Sept. 30, 2003) (denying the defendants' motion for summary judgment based on the TMPA because a fact issue existed as to whether the defendants acted with malice); *Wheeler v.. The Methodist Hosp.*, 95 S.W.3d 628, 643 (Tex. App-Houston [1st Dist.] 2002, no pet.) (reviewing the district court's summary judgment in favor of the hospital to determine whether the plaintiff had raised "a genuine issue of material fact regarding whether Methodist acted with malice").

1. Definition of "Malice"

The TMPA does not define "malice," and Plaintiff and Defendants assert differing definitions of malice. Plaintiff, citing *Johnson v. Hosp. Corp. of Am.*, 95 F.3d 383, 395 (5th Cir.1996), and *Maewal v. Adventist Health Systems/Sunbelt, Inc.*, 868 S.W.2d 886, 893 (Tex.App.-Fort Worth 1993, writ denied), contends that malice means "knowledge that an allegation is false or with reckless disregard for whether the allegation is false." Defendants, citing *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 506 (Tex.1997), contend that malice should be defined as in TEX. CIV. PRAC. & REM.CODE ANN. § 41,001(7) (Vernon 1997):[7]

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[7] In 2003, TEX. CIV. PRAC. & REM.CODE ANN. § 41.001(7) was amended to define malice follows: "[A] specific intent by the defendant to cause substantial injury or harm to the claimant."

(A) a specific intent by the defendant to cause substantial injury to the claimant; or

(B) an act or omission:

(i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

In *Maewal*, the Fort Worth Court of Appeals analogized actions arising from the peer review process to libel actions arising from an employer's assessment of an employee, or an employer's investigation into an employee's alleged wrongdoing. *Maewal*, 868 S.W.2d at 893. In those libel actions, a plaintiff must show "actual malice" to overcome the employer's qualified privilege. *Id.* "Actual malice" means "publication of a statement with knowledge that it is false or with reckless disregard for whether it is false." *Id.* By analogy, the court held that malice in the context of the peer review process means "knowledge that an allegation is false or with reckless disregard for whether the allegation is false." *Id.* In *Johnson*, the Fifth Circuit vacated the district court's judgment, which erroneously applied the common law standard for malice, which requires "spite, ill will, evil motive or purposeful injury of another." The Fifth Circuit remanded the case, instructing the district court to apply the malice definition in *Maewal*.

This Court is bound by the Fifth Circuit's interpretation of state law unless "a subsequent state court decision or statutory amendment" renders the Fifth Circuit's prior decision clearly wrong. *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 747 (5th Cir.1995). Therefore, unless a subsequent state court de-

cision renders the *Johnson* decision clearly wrong, this Court must interpret malice to mean "knowledge that an allegation is false or with reckless disregard for whether the allegation is false."

First, subsequent to *Johnson*, Texas cases analyzing how a plaintiff must overcome an employer's qualified privilege in libel actions still require a showing of actual malice as defined in *Maewel*. *E.g., Austin v. Inet Technologies, Inc.*, 118 S.W.3d 491, 496 (Tex.App.-Dallas 2003, no pet. h.). Therefore, the analogy between libel actions arising from an employer's assessment of an employee or an employer's investigation into an employee's alleged wrongdoing and actions arising from the peer review process still supports the *Maewal* definition of malice.

Second, the TMPA has been re-codified since the decisions in *Maewel* and *Johnson*. When *Maewel* and *Johnson* were decided, the provisions now codified in TEX. OCC.CODE ANN. § 160.010(b) & (c) (Vernon 2003) were codified in TEX. CIV. PRAC. & REM.CODE ANN. art. 4495b § 5.06(l) & (m). However, the statutory text of these provisions is virtually identical. Article 4495b § 5.06(1) stated:

> A cause of action does not accrue against the members, agents, or employees of a medical peer review committee or against the health-care entity from any act, statement, determination or recommendation made, or act reported, without malice, in the course of peer review as defined by this Act.

By comparison, section 160.010(b) states almost identically:

> A cause of action does not accrue against a member, agent, or employee of a medical peer review committee or against a health care entity from any act, statement, determination or recommendation made, or act reported, without malice, in the course of medical peer review.

Article 4495b § 4495b(m) stated:

> A person, health-care entity, or medical peer review committee that, without malice, participates in medical peer review activity or furnishes records, information, or assistance to a medical peer review committee or the board is immune from any civil liability arising from such an act.

By comparison, section 160.010(c) states almost identically:

> A person, medical peer review committee, or health care entity that, without malice, participates in medical peer review or furnishes records, information, or assistance to a medical peer review committee or the board is immune from any civil liability arising from that act.

Therefore, this re-codification does not affect the *Johnson* definition of malice.

Third, after the Fifth Circuit decided *Johnson*, the Texas Supreme Court decided *Agbor*. Defendants and multiple Texas courts of appeals have interpreted *Agbor* as holding that the definition of malice in TEX. CIV. PRAC. & REM.CODE ANN. § 41.001(7) should be used to define malice in the TMPA. *Wheeler*, 95 S.W.3d at 641; *Roe v. Walls Reg'l Hosp.*, 21 S.W.3d 647, 654 (Tex.App.-Waco 2000, no pet.); *Denton v. Big Spring Hosp. Corp.*, 998 S.W.2d 294, 298 (Tex.App.-Eastland 1999, no pet.).

In *Agbor*, the Texas Supreme Court analyzed whether the TMPA applies to patients' negligent credentialing actions. *Agbor*, 952 S.W.2d 503. The plaintiffs argued that the TMPA did not apply to patients' credentialing actions because, if the TMPA were to apply, a plaintiff could never prove that a credentialing body acted with malice toward a specific patient. Therefore, the plaintiffs argued that, because the legislature did not intend to preclude all patients' negligent credentialing actions, the TMPA did not apply to those actions.

The Texas Supreme Court rejected this argument, reasoning that the TMPA would not require a showing of malice toward a specific patient. To reach this conclusion, the Texas

Supreme Court first cited *Shannon v. Jones*, 13 S.W. 477, 478 (1890), for the proposition that, under the common law, proof of malice does not necessarily require conduct directed toward a specific person. *Agbor*, 952 S.W.2d at 506. The Texas Supreme Court noted in a parenthetical that the *Shannon* court defined malice as "a reckless disregard for the rights of others." Id. Next, the Supreme Court cited the definition of malice in TEX. CIV. PRAC. & REM.CODE ANN. § 41.001(7) and noted that the "definition does not require an act directed toward a specific person." *Id.* The Texas Supreme Court concluded:

> Considering the Legislature's pronouncement that "malice" need not be directed toward a specific individual in the context of exemplary damages, it does not follow that in the context of peer review, the committee must necessarily act with malice toward a specific patient for that patient to prove his or her case. Therefore, the fact that the Legislature chose to allow suits only for malicious conduct in no way dictates that the statute does not apply to patients' claims.

Id.

In *Agbor*, the Texas Supreme Court does not clearly adopt the definition of malice in § 41.001(7). Rather, the Texas Supreme Court looks at two different definitions of malice and notes that under neither definition is the malice required to be directed toward a specific person. Therefore, the Texas Supreme Court's holding in *Agbor* does not render the *Johnson* decision clearly wrong. Some courts, post- *Agbor*, have continued to apply the *Maewal* definition, albeit without analyzing whether the § 41.001(7) definition is more appropriate. *E.g.*, *Poliner*, 2003 WL 22255677, at *15 (Judge Solis in the Northern District of Texas); *Ubinas-Brache*, 68 S.W.3d at 40 (Dallas Court of Appeals). Therefore, the Court must analyze whether Plaintiff has proffered evidence that the Defendants acted with "knowledge that an allegation is false or with reckless disregard for whether the allegation is false."

The TMPA is silent about the proper standard of proof by which Plaintiff must prove malice, in order to overcome the immunity provided by the TMPA. Defendants argue that Plaintiff is required to show Defendants' malice by clear and convincing evidence, while Plaintiff argues that malice need merely by shown by a preponderance of the evidence. Both *Maewal* and *Johnson* are silent about the proper standard of proof, but the Court concludes that Plaintiff must prove malice by clear and convincing evidence in order to overcome the immunity provided by the TMPA. First, in *Maewal*, the court analogized the application of the TMPA to the qualified privilege in libel actions arising from the employer/employee relationship. To overcome the qualified privilege in those libel actions, a plaintiff must show actual malice by clear and convincing evidence. It is unlikely that the court would have adopted the presumption of an absence of malice and the definition of malice from those libel actions without similarly intending to adopt the clear and convincing standard of proof. Second, in *Duffy v. Leading Edge Products, Inc.*, a libel action arising from the employer/employee relationship, the Fifth Circuit treated the definition of malice and the standard of proof required to show malice as inseparable. See *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 313 (5th Cir.1995). After defining malice as it is defined in Maewal, the Court stated: "This is a higher standard than common law malice; only clear and convincing proof will support recovery." *Id.* Therefore, in *Johnson*, when the Fifth Circuit rejected the common law definition of malice and adopted the *Maewal* definition of malice, the Fifth Circuit likely adopted the clear and convincing standard of proof as well. Therefore, the Court finds that to overcome the immunity provided by the TMPA Plaintiff is required to show Defendants' malice by clear and convincing evidence. *See Poliner*, 2003 WL 22255677, at *15 (requiring "clear evidence of actual malice").

"When a heightened proof standard will apply to the trial disposition of an issue, that standard applies at the summary judgment stage." *Poly-America, Inc. v. Serrot Int'l, Inc.*, No. 3:00-CV-1457-D, 2002 WL 1996561, at *2 (N.D.Tex. Aug. 26, 2002). "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Therefore, where, as here, Plaintiff must ultimately show actual malice by clear and convincing evidence, the Court must determine whether the evidence presented is such that a reasonable factfinder might find, by clear and convincing evidence, that Defendants acted with knowledge that the allegations about Plaintiff were false or with reckless disregard for whether the allegations were false.

Under Texas law, in order to show that a defendant acted with reckless disregard for the truth of an allegation, a plaintiff must present "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth." *Duffy*, 44 F.3d at 313. Falsity coupled with negligence, failure to investigate the truth or falsity of a statement, and failure to act as a reasonably prudent person are insufficient to show malice. *Id.; Maewal*, 868 S.W.2d at 893. Immunity is not lost if the defendant "actually believed" the allegation to be true. *Duffy*, 44 F.3d at 314.

However, evidence of ulterior motive or animosity, coupled with evidence of inadequate investigation or fabrication, may be sufficient to prove actual malice. *Duffy*, 44 F.3d at 315 ("Duffy complains that the investigation was inadequate, but this by itself is clearly not sufficient to show actual malice. Arguably, we might be more persuaded by his insistence that the investigation was a mere pretext for a decision that had already been made to terminate him if there were some evidence of ulterior motive. The record, however, is devoid of any evidence that Leading Edge fabricated these charges or that the decision was based on anything other than these two

incidents as reported to DiStefano."); *see also Poliner*, 2003 WL 22255677, at *15 (citing *Duffy* for the proposition that "inadequate investigation coupled with the presence of ulterior motives may be sufficient to raise a fact issue as to actual malice"). To exemplify this proposition, the Fifth Circuit in *Duffy* cites *Frank B. Hall & Co., Inc. v. Buck*, 678 S.W.2d 612 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r .e.). In that case, Buck sued his former employer for defamation based, in part, on comments made by the company's office manager Eckert. Eckert stated that Buck was a "classical sociopath," that he would "verbally abuse and embarrass Hall employees," that he bad stolen files and records from a former employer, that he was "a Jekyll and Hyde person," that he had not reached his production goals, and that he was a "crook." *Id.* at 617-19. Buck presented evidence that these statements were inadequately investigated and that Eckert "harbored animosity toward Buck." *Id.* at 617-21. For example, their relationship was described as "strained at best," Buck had refused to testify favorably for Eckert in a lawsuit in which Eckert was involved, and Buck, although Eckert's subordinate, had been more highly compensated than Eckert. *Id.* at 620. The court found that this evidence constituted sufficient circumstantial evidence to support a jury finding of actual malice, noting that actual malice can be shown even without securing "an admission from the defendant that he published the statement knowing of its falsity or with serious doubt as to its truth." *Id.* at 621.

2. Proffered Evidence of Dr. Barnett's Malice

Plaintiff contends that he has presented sufficient evidence of Dr. Barnett's actual malice because he has presented evidence that Dr. Barnett inadequately investigated whether the allegations by the cath lab staff were true and harbored animosity toward Plaintiff. Plaintiff proffers the following as evidence of an inadequate investigation by Dr. Barnett:

- According to Dr. Edmonson, after Mr. Haupert's meeting with the cath lab staff, Mr. Haupert sum-

moned him to a meeting with Dr. Barnett, Kim Hollon, and others. After hearing the cath lab staff's complaints, Dr. Barnett stated that Dr. Jenkins should be suspended without further review. (Pl.App. at 654).

- After hearing Mr. Haupert's report of the meeting with the cath lab staff, Dr. Barnett requested authorization to appoint an ad hoc committee to determine whether Dr. Jenkins should be subject to corrective action, and, upon receipt of the authorization, appointed an ad hoc committee of five members. (Pl.App. at 491, 528).
- As a member of the CMB, after considering the ad hoc committee's recommendation and after hearing from Dr. Jenkins, Dr. Barnett approved a motion to summarily suspend Dr. Jenkins's cardiac catheterization laboratory privileges, pending further review. (Def.App. at 168).
- Two days later, as a member of the CMB, Dr. Jenkins approved a recommendation that Dr. Jenkins's membership and privileges be terminated unless he complied with certain conditions, including agreeing to undergo psychiatric evaluation and ongoing counseling from a psychiatrist selected by the CMB and agreeing to the monitoring of his behavior and conduct in the cath lab for an indefinite period of time by a monitoring committee. (Def.App. at 172-73).

Although he purportedly remarked that Dr. Jenkins should be "suspended without further review" upon hearing Mr. Haupert's report of the cath lab staff's complaints, Dr. Barnett did not then summarily suspend Dr. Jenkins. Rather, Dr. Barnett appointed an ad hoc committee, whose members interviewed the cath lab staff, colleagues of Dr. Jenkins, and Dr. Jenkins himself. The ad hoc committee's recommendation was then reviewed by the CMB members, who were provided with

transcripts from the ad hoc committee's meetings, except for the testimony of Ms. Tillman, and who further heard from Dr. Jenkins. Only thereafter was Dr. Jenkins summarily suspended. Therefore, the Court finds that Plaintiff has not presented sufficient evidence for a jury to conclude that Dr. Barnett inadequately investigated whether the cath lab staff's allegations against Dr. Jenkins were true.

The Court finds that Plaintiff has failed to present sufficient evidence of actual malice on the part of Dr. Barnett. Plaintiff has not presented any direct evidence that Dr. Barnett knew that the cath lab staff's allegations were false or that Dr. Barnett recklessly disregarded whether the allegations were false. Further, Plaintiff has not presented sufficient evidence of an inadequate investigation by Dr. Barnett. Absent evidence of inadequate investigation, Plaintiff has failed to present sufficient circumstantial evidence of actual malice on the part of Dr. Barnett. Therefore, the Court finds that the TMPA affords Dr. Barnett immunity for all state law claims asserted against him. The Court grants Dr. Barnett summary judgment on all state law claims asserted against him and grants Methodist summary judgment on all state law claims premised on Dr. Barnett's conduct.

3. Proffered Evidence of Mr. Wolfe's Malice

Plaintiff contends that he has presented sufficient evidence of Mr. Wolfe's actual malice because he has presented evidence that Mr. Wolfe's allegations were inadequately investigated or fabricated and that Mr. Wolfe harbored animosity toward Plaintiff. Plaintiff has presented Mr. Haupert's notes in support of his contention that Mr. Wolfe made the following statements about Dr. Jenkins at the cath lab meeting with Mr. Haupert:

- "belittling, berating, demeaning" (Pl.App. at 589).
- "a pathological personality" (Pl.App. at 592).

Further, Plaintiff has presented the transcript of Mr. Wolfe's testimony before the ad hoc committee in support of his con-

tention that Mr. Wolfe made the following allegations about Dr. Jenkins:

- "But a lot of the stuff he does is somewhat of poor technique in that when he handles his wires and his balloons, his hands are sticky with contrast. They're sticky. So he handles all these things, and I think in this case I'm certain that's what happened. The wire had contrast on it. As he handled and manipulated all that stuff, he introduces that into the lumen, at which time it stuck on there." (Pl.App. at 388).
- "From the outset of doing cases with this guy, he would belittle me, berate me, humiliate me, talk down to me." (Pl.App. at 397).
- "You could tell he was trying to make me make mistakes. It was very apparent that he was." (Pl.App. at 398).
- "[H]e pushes you to the point where you make mistakes." (Pl.App. at 400).
- Mr. Wolfe alleged that Dr. Jenkins put air in a syringe, which Mr. Wolfe then injected into a patient's coronary arteries, and that this was an example of Dr. Jenkins's setting him up "to make a mistake so he can point and affix blame on you." (Pl.App. at 401-02).
- "And if you complain-when we all complained early on in the cath lab, his response to us was he'd delay cases. He'd come in late. He'd dillydally around. He would do everything he could to agitate and instigate the staff." (Pl.App. at 412).
- "He does not accept responsibility for any complication. He will consistently affix blame anywhere else but himself." (Pl.App. at 416).
- "I mean, to go back to something really basic, when we're doing caths and post-cath, we give a contrast count The staff measures the bottles and they deter-

> mine how much fluid or contrast is left. They report that so that's part of the medical record. There's a person's chart of the procedure. And they'll say to the person who is monitoring, who is supposed to document this, it's this much. He will say, 'No, no, no. That's wrong. You need to change it to this.' ... We have technology now that counts it now to the physical cc and he still will say-he will try to lower his contrast usage to show that he's not using as much during his lengthy procedures." (Pl.App. at 417).

Plaintiff, in his affidavit, states that "none of the allegations were true." (Pl.App. at 706). Assuming, as the Court must at this juncture, that none of the allegations made by Mr. Wolfe were true, the Court finds that Plaintiff has presented sufficient evidence that Mr. Wolfe inadequately investigated some of the above allegations. For example, if it is untrue that Dr. Jenkins asked Mr. Wolfe to alter the log of his contrast usage, then this allegation was clearly inadequately investigated by Mr. Wolfe. Similarly, if it is untrue that Dr. Jenkins purposely put air in a syringe to set Mr. Wolfe up for error, this allegation was clearly inadequately investigated by Mr. Wolfe.

In addition, Plaintiff has presented the following evidence that Mr. Wolfe harbored animosity toward Plaintiff:

- Dr. Jenkins had complained throughout Mr. Wolfe's employment in the cath lab that he was incompetent. When Mr. Wolfe was promoted to cath lab supervisor, Dr. Jenkins vigorously opposed the promotion. (Pl.App. at 706).
- Shortly after joining the cath lab as a technician, Mr. Wolfe submitted a letter complaining that Dr. Jenkins made him feel humiliated, degraded, and dishonored. (Pl.App. at 522-23).
- Mr. Wolfe allegedly referred to Dr. Jenkins as "Mark" when Dr. Jenkins asked them to address him as "Dr. Jenkins." (Pl.App. at 703-04).

- Mr. Wolfe testified before the ad hoc committee: "I dislike one other person in the world besides that man." (Pl.App. at 421).

Viewing the evidence in the light most favorable to Plaintiff, the Court finds that a reasonable jury could find by clear and convincing evidence that Mr. Wolfe inadequately investigated the allegations that he made about Dr. Jenkins and that he harbored animosity toward Dr. Jenkins. Therefore, as in Buck, Plaintiff has presented sufficient circumstantial evidence to support a jury finding of actual malice on the part of Mr. Wolfe. *Buck*, 678 S.W .2d 612. Therefore, at this stage, Mr. Wolfe and Methodist are not entitled to immunity under the TMPA for Mr. Wolfe's conduct.

C. Health Care Qualified Immunity Act

Because the Court has found that Mr. Wolfe and Methodist are not immune under the TMPA for liability arising out of Mr. Wolfe's testimony before the ad hoc committee, the Court must additionally analyze whether the Health Care Qualified Immunity Act ("HCQIA") affords them immunity. Further, the Court must determine whether HCQIA affords immunity to Methodist for Plaintiff's claim for negligent hiring/supervision of Dr. Barnett.

First, HCQIA provides:

> Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

42 U.S.C. § 11111(a)(2).

For the reasons stated in Part II.B.3 of this Opinion, supra, the Court finds that Plaintiff has presented some evidence that Mr. Wolfe provided false information during the peer review process and that Mr. Wolfe knew that such information was false. *See Manion v. Evans*, No. 3:89-CV-7436, at *18 (N.D.Ohio July 8, 1991) (denying the defendants' motion for summary judgment on the basis of § 11111(a)(2) because a jury "could reasonably conclude that defendant deliberately misrepresented the facts"). Therefore, at this stage, Mr. Wolfe and Methodist are not entitled to immunity under § 11111(a)(2) for Mr. Wolfe's testimony. Further, Methodist's alleged negligent hiring and supervision of Dr. Barnett does not fall within the scope of conduct protected by § 11111(a)(2).

In addition to specifically providing immunity under § 11111(a)(2) to "those providing information to professional review bodies," HCQIA generally provides that, if a professional review action of a professional review body meets all of the standards specified in § 11112(a), the following categories of defendants shall not be liable in damages:

> (A) the professional review body,
>
> (B) any person acting as a member or staff to the body,
>
> (C) any person under contract or other formal agreement with the body, and
>
> (D) any person who participates with or assists the body with respect to the action.

42 U.S.C. § 11111(a)(1)(D).

A person who provides information to a professional review body is thus afforded a second opportunity to qualify for immunity as a "person who participates with or assists" a professional review body.[8] *See Singh v. Blue Cross & Blue Shield*

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[8] It is initially troubling that a person who fails to qualify for immunity under the specific requirements of § 11111(a)(2) because he knowingly provided false information to a professional review body should nonethe-

of Mass., Inc., 182 F.Supp.2d 164, 175 (D.Mass.2001) (recognizing dual bases for immunity under HCQIA for a person who assists a professional review body by providing information). Thus, Mr. Wolfe and Methodist are immune from liability for Mr. Wolfe's testimony if the professional review actions with which Mr. Wolfe participated or assisted satisfy the standards of § 11112(a).

Further, HCQIA broadly defines "professional review body" to include "a health care entity and the governing body of a health care entity which conducts professional review activity." 42 U.S.C. § 11151(11). Therefore, if the professional review actions with which Dr. Barnett was associated satisfy the standards of § 11112(a), Plaintiff's negligent hiring/supervision claim against Methodist, the health care entity on whose behalf the professional review actions were instituted, is within the scope of immunity afforded by § 11111(a)(1)(A).

Section 11112(a) imposes the following standards:

> [A] professional review action must be taken-
>
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

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less be afforded immunity if the professional review action based on that false testimony meets all the standards specified in § 11112(a). However, upon further consideration, the Court notes that, if a professional review action is taken according to the standards in § 11112(a), the negative effects of a person's false testimony will be minimized, thus rendering immunity appropriate.

> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a).

A professional review action is presumed to have met the preceding standards unless the presumption is rebutted by a preponderance of the evidence. *Id.* Therefore, at the summary judgment stage, the Court will determine whether Plaintiff has provided sufficient evidence to allow a reasonable fact-finder to find by a preponderance of the evidence that the preceding standards were not met with respect to the professional review actions in this case.

A professional review action is defined as follows:

> [A]n action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action....

42 U.S.C. § 11151(9).

Therefore, in this case, the Court must analyze whether the aforementioned standards were met with respect to the three professional review actions at issue in this case: (1) the July 26, 2000 decision to summarily suspend Dr. Jenkins's cath lab privileges, (2) the July 27, 2000 decision to continue the suspension of Dr. Jenkins's cath lab privileges until such time that Dr. Jenkins's complied with certain conditions, and (3) the July 27, 2000 recommendation that Dr. Jenkins's privi-

leges be terminated unless he complied with certain conditions. By testifying before the *ad hoc committee, which pro*vided the transcript of Mr. Wolfe's testimony to the CMB, Mr. Wolfe participated in all three professional review actions. Similarly, as a member of the CMB, Dr. Barnett was intricately involved in all three professional review actions.

1. "reasonable belief that the action was in the furtherance of quality health care"

This prong requires that the reviewers, "with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." H.R.Rep. No. 903, at 10, reprinted in 1986 U.S.C.C.A.N. at 6393. "In making this examination, most courts have adopted an objective standard of reasonableness." *Poliner*, 2003 WL 22255677, at *9.

Here, the Court finds that Plaintiff has failed to raise a material issue of fact as to whether the three professional review actions at issue in this case were taken in the reasonable belief that the actions furthered quality health care. When the CMB took these professional review actions, the CMB had before it the following evidence:

- the ad hoc committee's conclusion that Dr. Jenkins was largely responsible for a hostile environment in the cath lab that was potentially injurious to patient care
- the transcripts of testimony before the ad hoc committee about Dr. Jenkins purposely setting up the staff to make mistakes, without regard to patient safety
- the transcripts of testimony before the ad hoc committee about Dr. Jenkins instructing his staff to change contrast counts

- the transcripts of testimony before the ad hoc committee about the staff feeling rushed to perform their duties, causing them to fear making mistakes

Faced with this evidence, the CMB took professional review actions narrowly tailored to redress these concerns. Faced with the prospect of imminent injury to patients, the decision to summarily suspend Dr. Jenkins's cath lab privileges and the decision to continue that suspension were reasonably in the furtherance of quality health care. Further, faced with evidence that the hostile environment in the cath lab was irreparable absent a change in Dr. Jenkins's interpersonal skills, the CMB's recommendation to terminate Dr. Jenkins's privileges unless he took certain steps to cure his interpersonal problems was reasonably in the furtherance of quality health care. Therefore, in light of the evidence before the CMB when the actions were taken, the Court finds that Plaintiff has failed to raise a fact issue as to whether the professional review actions were not taken in the reasonable belief that the actions were in the furtherance of quality health care.

2. "after a reasonable effort to obtain the facts of the matter"

Analyzing this prong, the Court will determine whether "the totality of the process" leading up to the professional review actions evidenced a reasonable effort to obtain the facts of the matter. *Onel v. Tenet Healthsystems*, No. 02-2636, 2003 WL 22533616, at *5 (E.D.La. Oct. 31, 2003). Prior to the three professional review actions in this case, the ad hoc committee interviewed Mr. Barry, Mr. Wolfe, Mr. McDonnell, Ms. Bretton, Dr. Lipscomb, Dr. Edmonson, Dr. Levin, Dr. Jenkins, and Ms. Tillman. The transcripts of this testimony, except that of Ms. Tillman, were before the CMB when it took the professional review actions in this case. The Court finds that Plaintiff has failed to raise a fact issue as to whether the totality of the process did not evidence a reasonable effort to obtain the facts of the matter.

3. "after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances"

HCQIA requires that a professional review action be taken "after adequate notice and hearing procedures are afforded to the physician involved or after other such procedures as are fair under the circumstances." 42 U.S.C. § 11112(a)(3). However, HCQIA also contains an emergency provision, which states that § 11112(a)(3) shall not be construed as "precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual." 42 U.S.C. § 11112(c)(2). "The summary provision's language is broad, and permits summary action in any case where the failure to act 'may result in an imminent danger' to any individual's health, subject only to subsequent notice and hearing." *Onel*, 2003 WL 22533616, at * 5. The Court must determine whether the three professional review actions at issue in this case (1) were preceded with adequate notice and hearing procedures, (2) were preceded with such other procedures as are fair to the physician under the circumstances, or (3) were subject to the emergency provision.

Prior to the three professional review actions at issue in this case, Dr. Jenkins was afforded two opportunities to be heard. First, Dr. Jenkins was notified on July 19, 2000 of his right to appear before the ad hoc committee on July 20, 2000 at 7:00 a.m. to address complaints alleging "demeaning comments to the staff, berating the staff, threatening the staff with loss of employment, and other disruptive behavior," and Dr. Jenkins exercised this right. Second, Dr. Jenkins was notified on July 24, 2000 of his right to appear before the CMB the evening of July 25, 2000, and Dr. Jenkins again exercised his right to appear.

Since the decision to summarily suspend Dr. Jenkins's cath privileges and the decision to continue that suspension constitute "immediate suspension or restriction of privileges," these professional review actions were within the scope of the emergency provision if the failure to take these actions may have resulted in an imminent danger to any individual's health.

When the CMB decided to summarily suspend Dr. Jenkins's cath lab privileges and to continue that suspension, the CMB had the following evidence before it:

- the ad hoc committee's conclusion that Dr. Jenkins was largely responsible for a hostile environment in the cath lab that was potentially injurious to patient care
- the transcripts of testimony before the ad hoc committee about Dr. Jenkins purposely setting up the staff to make mistakes, without regard to patient safety
- the transcripts of testimony before the ad hoc committee about Dr. Jenkins instructing his staff to change contrast counts
- the transcripts of testimony before the ad hoc committee about the staff feeling rushed to perform their duties, causing them to fear making mistakes

The Court finds that the CMB reasonably concluded that the failure to take these professional review actions could result in imminent danger to the health of any individual. Therefore, as long as Dr. Jenkins was subsequently afforded notice and hearing or other adequate procedures, the emergency provision is satisfied with respect to these professional review actions.

Following the July 26, 2000 decision to summarily suspend Dr. Jenkins's cath lab privileges and the July 27, 2000 decision to continue the suspension until Dr. Jenkins com-

plied with certain conditions, Dr. Jenkins was notified of his right to request, within thirty days, a hearing by a panel. On August 23, 2000, Dr. Jenkins made this request, and, after a laborious inquiry, the hearing panel unanimously disagreed with the summary suspension of Dr. Jenkins's cath lab privileges. On February 20, 2001, upon receipt of the hearing panel's report, the CMB unanimously made a final recommendation to reinstate Dr. Jenkins's cath lab privileges, and, on February 28, 2001, Mr. Chase notified Dr. Jenkins that the Board of Directors of Methodist had adopted the CMB's final recommendation to reinstate his cath lab privileges.

The Court finds that Dr. Jenkins was afforded adequate notice and hearing procedures following the CMB's July 26, 2000 decision to summarily suspend his cath lab privileges and following the CMB's July 27, 2000 decision to continue that summary suspension. Therefore, the Court finds that, with respect to these two professional review actions, the emergency provision was satisfied.

Unlike the two aforementioned professional review actions, the CMB's July 27, 2000 recommendation that Dr. Jenkins's membership and privileges be terminated unless he complied with various conditions is not subject to the emergency provision, which applies only to "immediate suspension or restriction of clinical privileges." One court has found that a physician need not be afforded adequate notice and hearing or other fair procedures prior to a mere recommendation as to staff privileges, so long as the physician is afforded such procedures prior to implementation of the recommendation:

> Dr. Monroe claims that the defendants failed to meet the section 11112(a)(3) requirement because he was denied formal notice and a full hearing before the June 28, 1990 recommendation that his staff privileges by revoked. However, the statute does not require such notice and hearing before a peer review committee investigates and makes a recommendation as to clinical privileges.

Monroe v. AIM Hosps., 877 F.Supp. 1022, 1029 (S.D.Tex. 1994).

However, by its own terms, HCQIA requires that a professional review action be taken "after" adequate notice and hearing procedures or "after" such other procedures as are fair, and a professional review committee's "recommendation" is within the statutory definition of "professional review action." Therefore, the Court must determine whether Dr. Jenkins was afforded adequate notice and hearing or other procedures that were fair to him before the CMB's recommendation. Although the Court disagrees with the court's reasoning in Monroe, the Court considers the fact that a physician is afforded further notice and hearing procedures prior to a recommendation's taking effect to be relevant to whether the procedures afforded the physician were fair under the circumstances.

Prior to the CMB's recommendation, Dr. Jenkins was afforded two opportunities to be heard, with one day's notice prior to each opportunity. Further, the CMB's recommendation that Dr. Jenkins's privileges be terminated absent compliance with certain conditions did not take effect immediately. Rather, subsequent to the recommendation's being made and prior to its taking effect, Dr. Jenkins had the right to request, within thirty days, a hearing by a panel. Dr. Jenkins exercised this right, the hearing panel unanimously disagreed with the CMB's recommendation, and the CMB's recommendation was never instituted. Therefore, in light of these circumstances, the Court finds that Plaintiff has failed to raise a genuine issue of fact as to whether, prior to the CMB's recommendation, Dr. Jenkins was afforded procedures that were not fair to him under the circumstances.

4. "in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3)"

This standard "essentially combines the first three elements" of § 11112(a). *Onel*, 2003 WL 22533616, at *6. Evaluating the actions taken by the CMB on the basis of the facts before it, the CMB's efforts to obtain the relevant facts, the CMB's reasonable conclusion that the failure to immediately remove Dr. Jenkins might result in imminent danger to the health of patients, and the notice and hearing procedures that were afforded Dr. Jenkins, the Court concludes that Dr. Jenkins has failed to raise a fact issue as to whether the professional review actions were not taken in the reasonable belief that they were warranted.

The Court finds that Plaintiff has failed to raise a genuine issue of fact as to whether the peer review actions at issue in this case did not satisfy the standards in § 11112(a).[9] Therefore, to the extent Plaintiff asserts state law claims premised on the effect of Mr. Wolfe's testimony on the professional review actions in this case, the Court grants Mr. Wolfe and Methodist summary judgment. Further, to the extent Plaintiff asserts a negligent hiring/supervision claim against Methodist for negligently allowing Dr. Barnett to participate in these decisions, the Court grants Methodist summary judgment on the basis of immunity.[10] Thus, the Court hereby grants Mr.

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[9] The Court notes that this holding serves as an additional basis for the grant of summary judgment on all state law claims asserted against Dr. Barnett, Mr. Chase, Mr. Haupert, and Mr. Hollon.

[10] The Court further notes that, even if Methodist were not within the HCQIA definition of "professional review body," the Court would grant Methodist summary judgment for Plaintiff's negligent hiring/supervision claim. Under Texas law, a claim for negligent hiring/supervision is only cognizable if the employee committed "an actionable tort." *Gonzales v. Willis*, 995 S.W.2d 729, 739 (Tex.App.-San Antonio 1999, no pet.); *Luna v. Walgreen*, No. 3:00-CV-2248-R, 2001 WL 1142806, at *5 (N.D.Tex.

Wolfe and Methodist summary judgment on the remaining state law claims in this case.

D. Claim under 42 U.S.C. § 1981

Section 1981 provides that "all persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens." 42 U.S.C. § 1981(a). To establish a claim under § 1981, a plaintiff must show: (1) that he is a member of a racial minority; (2) that the defendant had an intent to discriminate on the basis of race; and (3) that the discrimination concerned the making and enforcing of a contract. *Bellows v. Amoco*, 118 F.3d 268, 274 (5th Cir.1997). At the January 22, 2004 hearing, the Court granted summary judgment to all Defendants because Plaintiff failed to provide sufficient evidence that the Defendants' alleged discrimination concerned the making and enforcing of a contract. In this Opinion, the Court further holds that, even if Plaintiff had provided sufficient evidence that Defendants' alleged discrimination concerned the making and enforcing of a contract, Defendants are entitled to summary judgment because Plaintiff has failed to present sufficient evidence the Defendants possessed the intent to discriminate against Plaintiff on the basis of race.

Sept. 21, 2001). "This rule comports with the fundamental tort principle that a person is not liable for negligence, no matter how egregious, unless the negligence causes a legally compensable injury." *Gonzales*, 995 S.W.2d at 739. "In the context of negligent hiring claims, if the employee did not commit an actionable tort, the plaintiff has not been injured in the eyes of the law." *Id.* Here, Plaintiff's negligent hiring/supervision claim is premised on the conduct of Dr. Barnett during the peer review process. However, the Court has already found that Dr. Barnett is "immune from civil liability" under the TMPA and "shall not be liable in damages" under HCQIA for his conduct during the peer review process. Therefore, the Court finds that, with respect to Dr. Barnett's participation in the peer review process, Dr. Barnett did not commit "an actionable tort" and Plaintiff did not suffer a "legally compensable injury." Therefore, Plaintiff's claim for negligent supervision/retention must fail under Texas law.

The Court's analysis of intentional race discrimination under § 1981 is identical to that performed under Title VII. *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir.2004) ("The standard of proof for Title VII discrimination claims also applies to § 1981 claims."). In *Desert Palace, Inc. v. Costa*, the Supreme Court significantly changed the appropriate analytical framework in Title VII cases by holding that direct evidence of discrimination is not required in mixed-motive cases. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003). In *Rachid v. Jack in the Box, Inc.*, the Fifth Circuit recognized the resultant merging of the mixed-motive and the pretext theories and articulated a "modified *McDonnell Douglas* approach:"

> [T]he plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, "the plaintiff must then offer sufficient evidence to create a genuine issue of material fact 'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (mixed-motive[s] alternative)." '

Rachid v. Jack in the Box, Inc., No. 03-10803, 2004 WL 1427046, at *5 (5th Cir. June 25, 2004) (quoting *Rishel v. Nationwide Mut. Ins. Co.*, 297 F.Supp.2d 854, 865 (M.D.N.C.2003)).

The Supreme Court's decision in *Desert Palace* was based on the statutory text of Title VII, which does not explicitly require a plaintiff to make a heightened showing through direct evidence in order to prevail on a mixed-motive theory. *Desert Palace*, 539 U.S. at 98-99 ("On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence."). In *Rachid*, the

Fifth Circuit extended this holding to discrimination cases under the ADEA because "the ADEA is similarly silent as to the heightened direct evidence standard." *Rachid*, 2004 WL 1427046, at *4. Because § 1981, like the ADEA and Title VII, does not state that direct evidence of discrimination is necessary to entitle a plaintiff to a mixed-motives analysis, the Court will apply the Fifth Circuit's modified *McDonnell Douglas* approach to Plaintiff's § 1981 claim. *See Carey v. FedEx Ground Package Sys., Inc.*, No. 2:02-CV-1052, 2004 WL 1368329, at * (S.D. Ohio June 15, 2004) (recognizing the applicability of *Desert Palace* to § 1981 claims because "the Court finds the distinction between § 1981 and Title VII not to be outcome determinative on this point"); *Walker v. Northwest Airlines, Inc.*, No. 00-2604, 2004 WL 114977, at *6 (D.Minn. Jan. 12, 2004) (applying a modified *McDonnell Douglas* approach to § 1981 claims because, "like Title VII, section 1981 does not contain language directing courts to weigh direct evidence more heavily than circumstantial evidence").

Assuming *arguendo* that Plaintiff has satisfied his *prima facie* burden, Defendants have articulated a legitimate, non-discriminatory reason for summarily suspending Plaintiff's cath lab privileges and for recommending the termination of Plaintiff's privileges absent compliance with certain conditions: Defendants were concerned that Plaintiff had created a hostile environment in the cath lab and that the hostile environment was potentially injurious to patient care. Therefore, Plaintiff must present sufficient evidence either that (1) Defendants' reason was a pretext for discrimination, or (2) Defendants' reason, while true, was only one of the reasons for their conduct, and Plaintiff's race was another motivating factor. In support of these arguments, Plaintiff proffers the following evidence:

- On an unspecified date "years prior" to 1994, Dr. Barnett allegedly asked a Hispanic interviewee "why on earth a minority would think that he would have

the right to go to medical school at all." (Pl.App. at 637).

- In 1994, a Hispanic physician felt that it was "clear" that "Dr. Barnett's racial animosity ran so deep that he would do or say anything in an attempt to force" the physician to leave Methodist. (Pl.App. at 637).
- On an unspecified date between 1994 and 1999, Dr. Barnett allegedly referred to African-Americans as "gun-toting, drug pushing spooks." (Pl.App. at 637).
- On an unspecified date, Dr. Barnett allegedly told another African-American doctor that he could teach a monkey to practice medicine the way the he did. (Pl.App. at 635).
- According to Dr. Edmonson, in 1998, Dr. Barnett warned against granting Dr. Jenkins's application: "[Y]ou will never get rid of him." (Pl.App. at 652).
- In 1998, according to Dr. Jenkins, "[Dr. Barnett] attempted to run me off by telling me that he would not let me treat his dog." (Pl.App. at 702).
- Mr. Wolfe stated that he had "probably" heard Joseph McDonnell and Randy Almes refer to Dr. Jenkins as "a nigger" and that he believes the reference took place "off hospital grounds." (Pl.App. at 679-80).
- Mr. Wolfe stated that he had heard Jerald Turner, an African-American employee in the cath lab, use the word "nigger." (Pl.App. at 680; Def.App. at 229).
- Mr. Wolfe states that, "during the time Iraq invaded Kuwait," he heard persons at work use the term "sand nigger." (Pl.App. at 680). Mr. Wolfe transferred to the cath lab on April 11, 1999. (Pl.App. at 522). Therefore, Mr. Wolfe's reference to this term's being used "at work" did not refer to the cath lab.

- Mr. Barry states: "Kelly Wolfe and Randy Chapman spoke hatefully of Dr. Jenkins in the hospital. They treated him with mockery and disrespect and often harassed him." Mr. Barry further states: "I believe Dr. Jenkins was suspended because he was black." (Pl.App. at 642).
- Dr. Edmonson states: "I believe there were members of the cardiac catheterization laboratory that resented Dr. Jenkins' John Hopkins background, his African-American heritage, and his critique and criticism of their work." (Pl.App. at 655).

When analyzing whether this proffered evidence is sufficient to allow a rational jury to find that (1) Defendants' reason was a pretext for discrimination, or (2) Defendants were motivated in part by Plaintiff's race, the Court will analyze whether the alleged remarks are related to the protected class of persons of which Plaintiff is a member, whether the alleged remarks were proximate in time to the CMB's decisions, whether the alleged remarks were made by persons who participated in the CMB's decisions or by persons in positions to influence the CMB's decisions, and whether the alleged remarks were related to the CMB's decisions. *Rachid*, 2004 WL 1427046, at *8; *Patel v. Midland Mem'l Hosp. & Med. Ctr.*, 298 F.3d 333, 343-44 (5th Cir.2002).

Dr. Barnett participated in the CMB's decisions and was in a position to influence those decisions. However, none of the alleged racist remarks attributed to Dr. Barnett were made in reference to Dr. Jenkins, none were proximate in time to Dr. Barnett's summary suspension, and only two were made in reference to African-Americans as opposed to other protected classes of persons. Dr. Barnett's alleged statements that Methodist "will never get rid of" Dr. Jenkins and that he would not let Dr. Jenkins "treat his dog" evidence a mistrust of Dr. Jenkins but do not evidence any racial bias toward him. Further, the alleged single reference by Joseph McDonnell to Dr. Jenkins as a "nigger" is insufficient to show that his testimony

before the ad hoc committee was tainted by racial bias, nor is it sufficient to show that the CMB's decision, which was based in part on his testimony, was somehow tainted. Further, there is no evidence that Mr. Almes, who also allegedly made a single reference to Dr. Jenkins as a "nigger," was in a position to influence the CMB's decisions. Mr. Almes did not testify before the ad hoc committee, and his prior written complaint about Dr. Jenkins's requirements for the positioning of the handle controlling the movement of the catheterization table had already been rejected as "not meritorious." Mr. Wolfe's memory that the pejorative term "sand nigger" was used "at work" did not refer to its use in the cath lab and did not refer to its use in reference to African-Americans. The probative value of Jerald Turner's alleged use of the pejorative word "nigger" is minimal since Mr. Turner is African-American; it is thus extremely unlikely that Mr. Turner's use of the word "nigger" evidences racial bias. Further, there is no evidence that Mr. Turner used this word to refer to Dr. Jenkins, and there is no evidence that Mr. Turner in any way influenced the CMB's decisions. Mr. Barry's testimony that Mr. Wolfe and Mr. Chapman spoke "hatefully" of Dr. Jenkins, that they treated him with "mockery and disrespect," and that they "harassed" him does not permit the inference that any of this alleged mistreatment of Dr. Jenkins was based on Dr. Jenkins's race. Additionally, Mr. Barry's and Dr. Edmonson's personal opinions that Dr. Jenkins was discriminated against because he is African-American, without disclosure of the underlying facts on which these opinions are based, are unconvincing. Finally, as noted in part II.B.3 of this Opinion, Dr. Jenkins has provided sufficient evidence to allow a rational jury to find by clear and convincing evidence that Mr. Wolfe's testimony before the ad hoc committee was false and that Mr. Wolfe acted with malice in so testifying. However, Dr. Jenkins has not provided sufficient evidence to allow a rational jury to find that Mr. Wolfe's allegedly false testimony was motivated in any part by racial discrimination.

Therefore, the Court finds that Plaintiff has not presented sufficient evidence to allow a rational jury to find (1) that Defendants' reason was a pretext for discrimination, or (2) that Defendants' reason, while true, was only one of the reasons for their conduct, and Plaintiff's race was another motivating factor. For this additional reason, the Court grants Defendants' motion for summary judgment on Plaintiff's § 1981 claim.

E. Order to Show Cause

In Plaintiff's Brief in Support of Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment, Plaintiff attributes the following statement to Dr. Barnett: "Boy, I would not let you treat my dog." (Pl. Resp. Br. at 43). The record cited by Plaintiff as evidentiary support for this quote significantly does not include the word "boy." (Pl.App. at 702). At the January 13, 2004 hearing, the Court asked Plaintiff's counsel to submit affidavits explaining how this mis-citation occurred. Plaintiff's counsel complied, and, upon considering Plaintiff's counsel's explanation, the Court is extremely concerned that Plaintiff's counsel violated Federal Rule of Civil Procedure 11(b)(3) by failing to engage in an "inquiry reasonable under the circumstances" prior to making the allegedly factual statement. The inclusion of the word "boy" in a comment by Dr. Barnett to Dr. Jenkins was an arguably racist remark, which could have altered the outcome of this case. The Court is greatly troubled by the ethical implications of this mis-citation to the record. Therefore, pursuant to Federal Rule of Civil Procedure 11(1)(B), the Court puts Plaintiff's lead counsel on notice that the Court, on its own initiative, is considering imposing sanctions for violations of Rule 11(b)(3). In particular, the Court is considering publicly reprimanding Plaintiff's counsel in a published opinion. Plaintiff's counsel shall, within ten days of the date of this Opinion, show cause why Rule 11(b)(3) was not violated and why the Court should not publicly reprimand Plaintiff's counsel in a published opinion.

F. Entry of this Opinion under Seal

In the course of explaining the Court's reasoning, the Court has referenced various portions of the summary judgment record, which was filed under seal pursuant to the March 27, 2003 Protective Order entered in this case. Therefore, the Court is preliminarily entering this Opinion under seal. The Court is of the view that this Opinion should probably not remain under seal. Each party shall within ten days of the date of this Opinion file submissions of no more than five pages articulating a position on whether this Opinion should be kept under seal. At that time, the Court will determine whether to keep this Opinion under seal.

G. Entry of Judgment

After the Court determines whether to sanction Plaintiff's counsel and whether to maintain this Opinion under seal, the Court will enter a Final Judgment in this case.

SO ORDERED.
August 18, 2004

/s/ Barbara M.G. Lynn
BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

APPENDIX C

U.S. COURT OF APPEALS
FILED
March 19, 2007
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10117

G MARK JENKINS, MD
Plaintiff - Appellant

v.

METHODIST HOSPITALS OF DALLAS, INC; HOWARD CHASE; JOHN HAUPERT; JACK BARNETT; KELLY WOLFE; TIM MEEKS; KIM HOLLON
Defendants – Appellees

No. 05-10118

MD G MARK JENKINS
Plaintiff

v.

METHODIST HOSPITALS OF DALLAS, INC; ET AL
Defendants

DONALD H FLANARY, JR
Appellant

Appeals from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 1/31/07, 5 Cir., _____, _____ F.3d _____)

Before BARKSDALE, DeMOSS, and PRADO, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. Barksdale
United States Circuit Judge

REHG-4A

APPENDIX D

Methodist Hospitals of Dallas
Methodist Medical Center - Charlton Methodist Hospital

PRIVILEGED AND CONFIDENTIAL

February 5, 2001

Darrell Thigpen, MD
Chair, Corporate Medical Board
Methodist Hospitals of Dallas

RE: Medical Staff Privileges of G. Mark Jenkins, MD

Dear Dr. Thigpen:

At the request of the Chairman of the Corporate Medical Board, in accordance with the provisions in Article 2 of the Code of Hearing and Appeal Procedures, the hearing panel has conducted deliberations regarding the summary suspension of cardiac catheterization privileges and suspension of medical staff appointment and privileges for G. Mark Jenkins, MD. These deliberations were concluded on Friday, February 2, 2001. The panel spent approximately 34 hours involving testimony of 14 witnesses and reviewed 491 pages of documents related to the allegations.

The decision of the Hearing Panel is unanimous and is as follows:

1. The Hearing Panel disagrees with the summary suspension of Dr. Jenkins' cardiac catheterization privileges instituted on July 26, 2000.

2. The Hearing Panel disagrees with the recommendation of the Corporate Medical Board that Dr. Jenkins' medical staff appointment and privileges be terminated and the recommendations put forth to reinstate them, as stated in the minutes of the Corporate Medical Board meeting of August 24, 2000.
3. The Hearing Panel feels that the National Practitioner Data Bank should be petitioned to void the adverse recommendation.
4. Implementation of the recommendations listed below

The basis of the recommendations for the above decision is as follows:

1) Regarding the summary suspension of cardiac catheterization privileges: The Panel found no evidence of any adverse patient outcome or likelihood of , imminent danger related to Dr. Jenkins' actions. According to the National Practitioner Data Bank Guidebook referencing Part A of the Health Care Quality Improvement Act, HHS assumes that hospitals use summary suspensions for the purpose of protecting patients from imminent danger, rather than for reasons that warrant routine professional review actions.

2) Regarding the loss of staff appointment and medical staff privileges: The panel acknowledges that there are significant interpersonal relationship problems between some members of the cardiac catheterization lab and Dr. Jenkins, but it is not our impression that Dr. Jenkins has unilaterally created a "hostile environment" in that area. Or. Jenkins was actively recruited to Methodist Medical Center to expand and improve the capability of interventional cardiology, including, but not limited to primary coronary angioplasty in patients experiencing acute myocardial infarction. Such procedures necessarily must often be performed on an emergency basis, requiring mobilization of

staff members at unscheduled times. The complexity of such cases may often be greater than those to which the staff has been previously exposed. The number of such cases seemed to escalate beyond that which had been initially expected, and combined with some limitations and malfunctions of technical equipment, inadequate preparation of staff for different expectations of a new physician and possibly inexperience in some of the technicians, led to an increased level of stress in many personnel working in the lab. He was aware of personnel problems and attempted to address these with a member of the administration. It appears that the staff was not adequately prepared for the changes, which would occur with the increased demands on the cath lab. The non-meritorious sexual harassment claim filed by an employee further complicated the interpersonal relationship problem. Communication of complaints about Dr. Jenkins did not seem to be handled in a logical fashion, so that he could respond to them and be involved in resolution of the problems. Dr. Olson, Medical Director of the cardiac cath lab, was never interviewed by the Ad Hoc Investigating Committee. There was no evidence presented to indicate the existence of a psychiatric or psychological disorder in Dr. Jenkins. Cultural and racial issues may have complicated the interpersonal relationship problems.

The recommendations of the Hearing Panel are as follows:

1. That an unbiased, outside party, experienced in conflict resolution meet with Dr. Jenkins, as well as a of the cardiologists, administration, human resources, nurses, and technicians to resolve the conflicts
2. Expectations of each individual physician involved in the cath lab regarding technical requirements and level of assistance by employees be communicated to the Director, Medical Director, nurses, and technicians

3. Appropriate monitoring of cases be performed
4. Mandatory attendance of cath lab personnel at periodic inservice or continuing education meetings. This should include physicians.
5. Active involvement of physicians and technicians in evaluation and purchase of new equipment
6. Possible changes to the Medical Staff Bylaws delineating in greater detail processes for dealing with conflicts between medical staff and/or employees short of punitive actions as well as changes in the Code of Hearing Appeal Procedures with regard to involvement of legal counsel
7. Formation of a committee to deal with employed physician complaints at an informal level

The Hearing Panel wishes to express its appreciation for the members of the Ad Hoc Investigating Committee as well as the members of the Corporate Medical Board, who spent a great deal of time and effort evaluating this matter. We recognize that their decision was based on the information available to them at that time. The fact that the Hearing Panel's decision is in conflict with the above groups is in no way meant to demean the efforts of the physicians and administrators, all of whom are highly respected members of an outstanding health care team at a great medical institution.

[signature]
Michael S. Harris, MD, Chair
Fair Hearing Panel

[signature]
Rochelle McKown, MD

[signature]
Rita Phillips, MD

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(2)

No. 06-1688

FILED
AUG 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

G. MARK JENKINS, M.D.,

Petitioner,

v.

METHODIST HOSPITALS OF DALLAS, INC.; HOWARD CHASE; JOHN HAUPERT; JACK BARNETT; KELLY WOLFE; TIM MEEKS; and KIM HOLLON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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Dated: August 20, 2007

210545

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QUESTION PRESENTED

Did petitioner Dr. G. Mark Jenkins present evidence from which a reasonable jury could find that respondent Methodist Hospitals of Dallas, Inc.'s temporary suspension of his privileges to practice in one portion of the hospital was based on his African-American race?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Methodist Hospitals of Dallas, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CITED AUTHORITIES v

REASONS FOR DENYING THE PETITION 1

I. THE PETITION IS BASED ON A LARGELY FICTIONAL ACCOUNT OF THE EVIDENCE. 1

A. Misleading Statements Concerning Barnett and the Suspension. 1

B. Jenkins's Description of Alleged Disparate Treatment. 12

II. JENKINS'S ARGUMENTS ABOUT ALLEGED COMMENTS BEARING ON RACE ARE MISGUIDED. 15

A. Jenkins Waived His Attack on the Fifth Circuit's Approach to Evaluating Comments. 15

B. Jenkins Misdescribes the Fifth Circuit's Opinion as Dealing with the Admissibility of Evidence. 17

Contents

Page

C. The Alleged Conflict with *Reeves* and Other Circuit Courts Does Not Support Review. 19

III. JENKINS'S ARGUMENTS ABOUT HIS *PRIMA-FACIE* CASE AND OTHER CLAIMED EVIDENCE DO NOT WARRANT REVIEW. 22

IV. OTHER REASONS TO DENY THE PETITION 24

CONCLUSION 26

TABLE OF CITED AUTHORITIES

Page

CASES

Brown v. CSC Logic, Inc.,
82 F.3d 651 (5th Cir. 1996) 15, 16

Burlington Northern and Santa Fe Ry. Co. v. White,
126 S. Ct. 2405 (2006) 26

Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 15, 24, 25

Forrest v. Kraft Foods, Inc.,
285 F.3d 688 (8th Cir. 2002) 24

Helland v. South Bend Community School Corp.,
93 F.3d 327 (7th Cir. 1996) 23

Heyward v. Monroe,
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369 F.3d 1007 (7th Cir. 2004) 23

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411 U.S. 792 (1973) 16, 22, 24, 25

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990 F.2d 812 (5th Cir. 1993) 23

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 15

Cited Authorities

Page

Rachid v. Jack in the Box, Inc.,
376 F.3d 305 (5th Cir. 2004) 25

Radue v. Kimberly-Clark Corp.,
219 F.3d 612 (7th Cir. 2000) 24

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540 U.S. 44 (2003) 25

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) ..... *passim*

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180 F.3d 903 (8th Cir. 1999) 24

Swackhammer v. Sprint/United Management Co.,
___ F.3d ___, 2007 WL 1969672
(10th Cir. July 9, 2007) 23

Van v. Anderson,
199 F. Supp. 2d 550 (N.D. Tex. 2002) 16

Wyvill v. United Cos. Life Ins. Co.,
212 F.3d 296 (5th Cir. 2000) 24

Cited Authorities

Page

STATUTES

42 U.S.C. § 1981 ..... 25, 26

42 U.S.C. § 2000e-2(m) 25

RULES

Fed. R. Evid. 404 18

Fed. R. Evid. 404 cmt. (2006 Amend.) 18

Fed. R. Evid. 602 22

Fed. R. Evid. 701 22

SECONDARY AUTHORITY

The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits, 114 Yale L.J. 1063 (2005) 18

REASONS FOR DENYING THE PETITION

I. THE PETITION IS BASED ON A LARGELY FICTIONAL ACCOUNT OF THE EVIDENCE.

Jenkins takes too far the requirement that in considering summary judgment or judgment as a matter of law "the court must draw all reasonable inferences in favor of the nonmoving party." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). Indeed, Methodist[1] chose to respond to Jenkins's petition rather than submit a waiver mainly to object to — and prevent the Court from being misled by — the pervasive misstatements and omissions about the record in the petition.[2] Pursuant to Supreme Court Rule 15.2, those misstatements are as follows.

A. Misleading Statements Concerning Barnett and the Suspension.

Beginning on the "Questions Presented" page of his petition, Jenkins makes repeated statements about Dr. Jack Barnett's involvement in the decision to suspend Jenkins's cath-lab privileges. Among other things, Jenkins (i) accuses Barnett of being "principally responsible" for the suspension, *Pet.* at i, 7; (ii) states that Barnett "orchestrated the events" leading to the suspension, *Pet.* at 5; (iii) alleges that "due principally to the efforts of . . . Barnett," the hospital

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1. This brief is submitted by all of the respondents, but for convenience the brief will refer to all of the respondents simply as "Methodist."

2. Jenkins's footnote 2 about the pendency of Methodist's motion for attorney's fees appears to be offered only to invoke prejudice toward Methodist. It has no relevance to the issues in the petition.

suspended his cath-lab privileges, *Pet.* at 3; (iv) asserts that Barnett "aggressively promoted" the suspension, *Pet.* at 6; (v) accuses Barnett of playing a "key role" in every stage of the proceedings against him, *Pet.* at 6; (vi) says that Barnett "became an advocate" before the Methodist Corporate Medical Board ("CMB"), which officially effected the suspension, *Pet.* at 6; (vii) accuses Barnett "and another codefendant" of providing "false information" about him to the other 11 members of the CMB before they voted on the suspension, *Pet.* at 7; and (viii) claims that Barnett played a "leading role" in the suspension, *Pet.* at 16. Those statements — which are the foundation of most of Jenkins's argument for granting the petition — are without record support, as are a number of other statements Jenkins makes about Barnett and the suspension.

1. Barnett's role with the hospital. Jenkins describes Barnett as a "manager," a "hospital manager," and a "managerial employee" who acted for "hospital management." *Pet.* at i, 3, 7. In fact, however, Barnett (as opposed to some of the other individual defendants) did *not* manage Methodist. Barnett was a member of Methodist's medical staff and as part of that staff was the Chairman of the Department of Medicine, and he also ran the internal medicine residency program for infection control. D-App.-100, 243. The "medical staff" consists of the physicians granted medical staff appointments and privileges to practice medicine at Methodist. D-App.-75. They organize themselves and are governed by the Medical Staff Bylaws. *Id.* at 73. The CMB is the governing board of the Methodist medical staff. *Id.* at 75. The medical staff is separate from Methodist's management. *See, e.g., id.* As Chairman of the Department of Medicine, Barnett was a part of the medical staff. But there is no evidence that he was, or that he dealt with Jenkins in any capacity as, a "manager" of Methodist.

2. *Decision to form the AHC.* The evidence shows that on July 12, 2000, Pam Daniel (the Administrative Director of the Cardiology Department at Methodist), Tim Meeks (Human Resources Vice President for Methodist), and John Haupert (Associate Executive Director for Methodist with newly assigned responsibility for the cardiology area) attended a regularly scheduled meeting of the cath-lab staff in order to hear directly the staff's complaints about Jenkins. D-App.-66-68, 265-267, 271-271. Kim Hollon (Executive Vice President of Methodist) then requested a meeting between himself, Haupert, Dr. Robert Edmonson (the Director of Cardiology and head of the North Texas Cardiovascular Associates ("NTCA"), Jenkins's medical group), and Barnett (as Chairman of the Department of Medicine, of which the Cardiology Department is a part). D-App.-54, 66-68, 247-250, 276, 292-294. At the meeting, Edmonson at the very least agreed with, if he did not himself propose, formation of an ad hoc committee ("AHC") to address the complaints about Jenkins that Methodist had received. D-App.-247-250, 276, 292-294.

After being notified by Barnett of the request for corrective action as required by the Medical Staff Bylaws, D-App.-96, 250, Dr. Kirk Lipscomb (Chair of the CMB) submitted a written memorandum to Barnett, D-App.-97. The memorandum directed Barnett to appoint an AHC "to study the matter concerning the professional conduct of Dr. Jenkins and to extend an opportunity to Dr. Jenkins to discuss concerns which led to this action." *Id.* The memorandum also stated that the AHC will be responsible for reporting its investigation to the CMB within 30 days. *Id.*

3. Composition of the AHC. Barnett, as he was requested by Lipscomb and required to do under the Medical Staff Bylaws[3] given his position as Chairman of the Department of Medicine, D-App.-77, 97, chose the five-member AHC, D-App.-251. But his selections do not support any inference that he was principally responsible for their recommendation against Jenkins. To the contrary, Barnett chose a diverse group of leaders from the medical staff, including Dr. Darrell Thigpen (an African-American who was then President of the Methodist medical staff); Dr. Arturo Aviles (a Hispanic doctor); Dr. Freda Levy and Dr. Leigh Hunter (two female doctors); and Dr. Karl Brinker (a doctor who had enthusiastically backed Jenkins's appointment to the staff and who was particularly concerned with attracting and retaining more African-American doctors for Methodist). D-App.-50-51, 251, 296-297. Brinker chaired the committee. D-App.-162. The deck was not stacked against Jenkins from the start as he would have the Court to believe.

4. Decision of the AHC. Despite agreeing with (if not suggesting) the formation of an AHC, Edmonson signed an affidavit during this litigation stating that, during the initial meeting about the formation of the AHC, Barnett said that

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3. Methodist's Medical Staff Bylaws govern the peer-review process. D-App.-69-95. According to Section 7.1.1(1), which governs corrective action, whenever the activities or professional conduct of any practitioner with clinical privileges are considered to be lower than the standards or aims of the medical staff or to be disruptive to the operations of the hospital, corrective action against such practitioner may be requested. D-App.-77. Upon receipt of a request for corrective action that could result in a reduction or suspension of clinical privileges or a suspension or expulsion from the medical staff, the CMB shall forward the request to the chairman of the department in which a practitioner has privileges and direct the chairman to appoint a departmental AHC to investigate the matter. *Id.*

Jenkins should be suspended without further review. P-App.-654. But there was no suspension implemented at that time and the recommendation was to begin the peer-review process. *Id.* An AHC was ultimately formed before the suspension was implemented not by the AHC but by the CMB. P-App.-531-536. Edmonson was *not* a member of the AHC (or the CMB) or otherwise involved in the decision to suspend Jenkins's privileges, and Jenkins has no evidence from any AHC (or CMB) member who was involved that Barnett ever advocated suspension to them. P-App.-532-548.

Jenkins likewise has no evidence from any AHC member that Barnett provided inaccurate or misleading information to them. P-App.-1-724. Nor is there any evidence that Barnett attended the AHC interviews, influenced any testimony before the AHC, advocated suspension or termination to the AHC, or influenced the AHC recommendation. P-App.-352-470, 530. Indeed, Jenkins's unsupported argument that the AHC based its recommendation on information from Barnett contradicts his argument in response to Methodist's summary-judgment motion where he criticized the AHC for basing its decision "*exclusively* on Mr. Haupert's report of his July 12, 2000 meeting with the cath lab staff" and the four employees and three physicians it had interviewed.[4]

In his petition, Jenkins asserts — again without record support — that, after the AHC "failed to recommend immediate suspension, Dr. Barnett became an advocate before the [CMB]." *Pet.* at 6. That assertion is misleading. It is true that the AHC did not recommend suspension but that is because it recommended something more severe — termination of privileges — based on the view that Jenkins

4. Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment at 14 (emphasis added).

bore a large part of the responsibility for the hostile environment in the cath-lab, that Jenkins did not acknowledge his responsibility, and that the situation was not correctable. D-App.-162, 314-315.

5. Barnett's involvement in the CMB's suspension decision. Jenkins is simply wrong when he repeatedly says and implies that Barnett is the reason he was suspended. The actual evidence is to the contrary, even taking into account inferences in Jenkins's favor. Indeed, the CMB minutes are the only evidence Jenkins cites for what allegedly happened during the meeting (aside from the citation of a meaningless affidavit of a CMB member not present during the meeting as discussed in the section below). Those minutes do not reflect Barnett being the driving force (or any kind of force) behind the decision.

First, there is no evidence to support Jenkins's contentions that Barnett advocated suspension to the CMB and provided false information to the CMB. Although Barnett was a member of the CMB, it is undisputed that the Chair of the CMB (Dr. Kirk Lipscomb) was a member of Jenkins's medical group, NTCA. D-App.-97; P-App.-432-470, 532-543. And unlike most cases involving decisions to suspend employees, the decisional process here was recorded in the CMB minutes, which establish that Barnett did *not* serve as the CMB's primary source of information about Jenkins's problems, advocate or recommend to the other CMB members that Jenkins be suspended, or provide false information or otherwise influence them in any way. P-App.-532-543.

According to the CMB minutes, Barnett provided only the following information to the other CMB members:

> Dr. Lipscomb asked Dr. Barnett to give a report on the matter. Dr. Barnett reported that Administration had requested a meeting with him and Dr. Edmonson, the Cardiology Section Chief, following receipt of several complaints about Dr. Jenkins's behavior. At that meeting. Dr. Edmonson asked for an appointment to review and evaluate the situation in the cath lab and CCU [Critical Care Unit] that was the subject of the complaints(s). Dr. Barnett asked Mr. Haupert to give more details for the CMB's consideration.

P-App.-532. The CMB minutes do not otherwise reference Barnett providing *any* additional information to the other members, much less any false information. P-App.-532-536. And Barnett testified that he did not. D-Reply-App.-7-9. His testimony is corroborated by another CMB member who participated in the meeting. D-Reply-App.-18 ("My recollection of that meeting is, Dr. Barnett was very quiet."). Consequently, there is no evidence to support Jenkins's assertion that Barnett made any misrepresentations when reporting information to the CMB. *Id.*

The CMB minutes do reflect that Haupert provided additional information for the CMB's consideration. P-App.-532-533. In his petition, however, Jenkins states without record authority that Barnett and Haupert thereafter provided false information to the rest of the CMB. *See Pet.* at 7 ("Barnett and another codefendant [Haupert] provided false information about Dr. Jenkins to the Board before they voted."). There simply is no evidence to support Jenkins's

statement that Barnett (as opposed to Haupert) thereafter provided any information to the CMB, much less any false information. P-App.-532-536; *see also* D-Reply-App.-7 (referring to Haupert as the "principal source of information" at the CMB meeting).

Second, as an example of the "false information" allegedly provided by Haupert and Barnett, Jenkins complains in his petition that Shawn Tillman was the only witness Jenkins had specifically asked the AHC to interview, yet hers is the only testimony that was not transcribed. *Pet.* at 7, n.15. He further complains that "the incomplete transcripts then became the record that CMB members were urged to study before voting on what action to take against Dr. Jenkins." *Id.* Although Jenkins would like the Court to draw an adverse inference from the fact that Tillman's AHC interview was not transcribed, such an inference is not supported by the record. According to Thigpen (an African-American member of the AHC and the CMB who was then President of Methodist's medical staff), the AHC decided to interview Tillman at the last minute after interviewing Jenkins. D-App.-312-313. Because she was interviewed at the last minute, however, there was no court reporter available on the day of her interview, and therefore her testimony was not transcribed. *Id.* There is no evidence whatsoever that Barnett had anything to do with Tillman's testimony not being transcribed.

Relatedly, Jenkins says that Barnett and Haupert "falsely" summarized Tillman's testimony to the CMB, making it seem as though she testified adversely to Jenkins. *Pet.* at 7, n.15. But there is no evidence that Barnett (as opposed to Haupert) provided any information to the rest of the CMB concerning Tillman's testimony before the AHC. P-App.-532-533. And

the CMB minutes, upon which Jenkins relies to support his statement, summarize Tillman's testimony as follows: "Dr. Jenkins is not the only cardiologist who has difficulty working with the staff; but she could not disagree with anything reported as to Mr. Haupert." *Id.* at 533. This information is not false, as Jenkins asserts. *Compare* P-App.-533 (summarizing Tillman's testimony) *with* P-App.-618 (Tillman's affidavit from this litigation in which she states that "Dr. Jenkins is no more difficult to deal with than any other physicians I have worked with"; that "I was unaware of many of the situations discussed in the meeting, and I told John Haupert of this fact when he asked me about them"; and that "At the meeting, the ad hoc committee asked me about Dr. Jenkins's general behavior but I do not recall anyone asking me about any specific conduct or instances of patient endangerment.").

In sum, the 12 members of the CMB as a group, and not Barnett individually, made the decision Jenkins complains about in this lawsuit. P-App.-532-543. There is no evidence suggesting that Barnett provided any false information to the other 11 CMB members. P-App.-532-543. There is no evidence to support any inference that Barnett advocated or recommended suspension to the CMB, as Jenkins argues. To the contrary, the evidence shows that Barnett acted *only* in a ministerial capacity as he was required under the Medical Staff Bylaws to fulfill his responsibility as Chairman of the Department of Medicine. And there is no testimony from *any* member of the CMB — or *any* other evidence indicating — that Barnett exercised *any* leverage or influence over them. P-App.-532-543. The *only* inference to be drawn from the record is that the CMB members independently reviewed the AHC transcripts, assessed Jenkins's testimony firsthand, and drew their own conclusions about the action to take

concerning Jenkins. *See, e.g.*, D-Reply-App.-18. That undisputed evidence would not permit any reasonable jury to find that Barnett was principally responsible for the CMB's decision.

6. Fraga affidavit. Jenkins describes Dr. Mark Fraga "*as a member of the CMB who was present when the decision to summarily suspend was officially made*" and then points to Fraga's affidavit, which states that the CMB suspended Jenkins "with no effort to determine the accuracy of allegations." *Pet.* at 7 (emphasis added). But according to Fraga's own affidavit, he was *not* present when the CMB made its suspension decision. P-App.-644-645. That is because he did not become a member of the CMB until *after* Jenkins's privileges were suspended. P-App.-644. His testimony about the decisional process therefore is meaningless and certainly does not suggest that Barnett gave false information to the rest of the CMB or was principally responsible for their decision as Jenkins suggests.

7. Character assassination and name calling. Not satisfied with misrepresenting Barnett's role in the decisional process, Jenkins makes an all-out assault on Barnett's character. He (i) calls Barnett a "bigot" and "an intractable bigot" with a "long history of mistreating minority doctors" at the hospital; (ii) accuses Barnett of exhibiting "a pattern of conduct in which [he] employs racially charged language in the presence of minority doctors, insults them, and falsely accuses them"; (iii) accuses Barnett of having a "modus operandi" of acting negatively towards minorities in general; (iv) argues that "Dr. Barnett has mistreated minority doctors often enough for it to be considered habitual"; and (v) asserts that Barnett's "modus operandi" is to insult and falsely accuse minority physicians in order to cause them to leave the

hospital on their own and that he fell victim to "Dr. Barnett's preferred method of ridding his hospital of minority doctors." *Pet.* at 5-7, 16. Those are not facts; they are Jenkins's labels and conclusions. But they amount to no more than name-calling and character assassination. Even if Jenkins wanted to argue that the facts as he sees them would allow a jury to view Barnett as Jenkins describes him, by what legal principle would that be a permissible approach? It plainly is an argument that Barnett has a "bad" character and therefore acted "badly" in connection with Jenkins. That approach has long been rejected by the courts and the rules of evidence.

8. The nature of the suspension. Jenkins says that a "summary suspension is procedurally unique and susceptible to manipulation" compared to "other peer-review investigations, even those in which ultimate termination of hospital privileges is under consideration, [where] a full due-process hearing must precede any penalty." *Pet.* at 8. Likewise, he says the process was "bereft of procedural safeguards." *Pet.* at 10. Although he is correct that a summary suspension is *permitted* without prior notice or opportunity to be heard, that is not what happened here. Jenkins *was* given notice of the complaints and an opportunity to respond, both to the AHC before it voted to terminate his privileges, P-App.-529 and D-Reply-App.-188-292, and again before the CMB recommended the suspension, D-App.-163, 166-168.

9. The complaints about Jenkins. Jenkins understates the nature of the cath-lab complaints against him when he says they dealt only with his rude and brusque communication style and resulting hostile working environment. *Pet.* at 4. He also misses the mark when he criticizes the hospital allegedly failing "to identify a single patient whom he had ever endangered." *Id.* The evidence shows that cath-lab

complaints not only referenced a hostile working environment but also specifically included possible patient harm. D-App.-66-67. After investigating, the AHC concluded, moreover, that "there is a hostile environment in the cath lab, which is potentially injurious to patient care." D-App.-162. The CMB considered that conclusion in making its decisions. D-App.-165.

B. Jenkins's Description of Alleged Disparate Treatment.

Jenkins says he received "grossly disparate treatment . . . compared to other doctors similarly situated who were not black." *Pet.* at 8. The two doctors at issue are Dr. T and Dr. V,[5] both of whom had also been peer-reviewed for unprofessional conduct toward the staff. D-Reply-App.-60-100. Although Dr. T and Dr. V were peer-reviewed for similar reasons as Jenkins and were likewise given notice of the complaints and an opportunity to be heard as was Jenkins, *id.*, Jenkins now asserts he was treated "far more severely" and they were treated "more leniently" because their privileges were not suspended like his were. *Pet.* at 8. Jenkins makes impermissible leaps and omits critical undisputed facts concerning his disparate-treatment argument that result in a misleading presentation.

Unlike Jenkins, Dr. T did not deny that he had acted in the manner described in the complaint about him or deny his responsibility for creating the problems at issue when interviewed by his ad hoc committee. D-Reply-App.-63-67. In addition, the ad hoc committee that interviewed Dr. T and recommended corrective action was composed of completely

5. Because of confidentiality concerns, their full names were not provided during discovery.

different members than the AHC that investigated Jenkins. D-App.-162; D-Reply-App.-63. There is also no evidence that the corporate medical board that considered Dr. T was made up of the same members as the CMB that considered Jenkins. D-Reply-App.-65. Methodist also reported to the National Practitioner Data Bank ("NPDB") that Dr. T had resigned while under, or to avoid, investigation relating to his professional conduct and after corrective action had been recommended. D-Reply-App.-71.

With regard to Dr. V, Jenkins primarily complains because Dr. V received counseling before his formal corrective action and that his privileges were conditionally approved as opposed to being suspended. But the evidence shows that Jenkins also received the benefit of informal discussions (at least from NTCA member Edmonson) concerning staff complaints before formal corrective action was initiated. D-App.-265-266. And Jenkins's hospital privileges were also reapproved and extended. D-App.-62-63.

The decisionmakers involved concerning Dr. V, moreover, were entirely different than the decisionmakers involving Jenkins. For example, the Credentials Committee initially recommended that Dr. V's privileges be extended only 60 days pending further review by the Medicine Executive Committee. D-Reply-App.-80. The Medicine Executive Committee interviewed Dr. V and recommended, among other things, that he be reappointed for a probationary year and that he be required to meet certain conditions. *Id.* at 83-89. Because the probation was a form of corrective action, however, an ad hoc committee was formed to investigate the situation. *Id.* at 90-92. There is no evidence that the ad hoc committee that considered Dr. V was

comprised of the same AHC members that considered Jenkins. *Id.* In any event, Dr. V's ad hoc committee recommended non-renewal of privileges, *id.* at 92, just as Jenkins's AHC recommended termination of his privileges. When the Corporate Credentials Committee (not the CMB, which considered the AHC recommendation concerning Jenkins) considered the recommendation, they concluded that Dr. V's privileges should not be renewed. *Id.* at 99. Dr. V then requested that his application for reappointment be rescinded. *Id.* at 100.

In short, Methodist's treatment of Dr. T and Dr. V does not permit an inference of intentional discrimination.

Jenkins also states that he was treated more severely than other cardiologists. In support of his statement, he cites several affidavits. But they do not identify the cardiologists with whom Jenkins is attempting to compare himself, much less disclose whether the physicians are non-black and therefore outside the protected category. *See* P-App.-610-611 (Hunt affidavit), 622 (White affidavit), and 631-632 (Harrison affidavit). Furthermore, he has no evidence but only speculation to support his statements that these other cardiologists were never suspended, disciplined, or subject to peer-review investigation. Nor, most critically, does he have any evidence that Barnett was involved in reviewing their conduct or the conduct of anyone else he refers to when he says Methodist treated him in a "grossly disparate" manner "compared to nonblack hospital physicians similarly situated." *Pet.* at 18.

II. JENKINS'S ARGUMENTS ABOUT ALLEGED COMMENTS BEARING ON RACE ARE MISGUIDED.

Jenkins argues that the Fifth Circuit has — except in cases he deems acceptable because the plaintiff prevailed — persistently refused to follow this Court's decision in *Reeves* concerning the evidentiary value of alleged discriminatory comments. In particular, he repeatedly criticizes the Fifth Circuit's use of a four-part test for evaluating such comments[6] and claims that the test conflicts with *Reeves*, *Desert Palace*,[7] and decisions of other circuits. As shown below, there is no such conflict. But even if there were, this case plainly would not be the vehicle to resolve it.

A. Jenkins Waived His Attack on the Fifth Circuit's Approach to Evaluating Comments.

Despite strongly criticizing the Fifth Circuit's four-part test to evaluate allegedly discriminatory remarks" as "improperly restrictive"[8] and "peculiar,"[9] before the district court Jenkins not only failed to challenge the test, he embraced it. In his brief in response to Methodist's motion for summary judgment, Jenkins relied on the remarks he points to in his petition only as "direct evidence of racially

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6. *See Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655-56 (5th Cir. 1996). The test Jenkins criticizes is traceable to Justice O'Connor's opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring), and circuit court cases predating *Hopkins*.

7. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

8. *Pet.* at 9.

9. *Id.* at 12, 13.

based discrimination" rather than as proof of discrimination through the indirect *McDonnell Douglas*[10] method of proof.[11]

More importantly, he actually relied on the very test he now attacks. He quoted a summary of the same four-part test he describes in his petition[12] and urged the district court that he prevailed under it.[13] He *never* advocated to the district court that the test conflicted with *Reeves* or otherwise was improper. Jenkins thus should not have been surprised that the district judge used that test in her summary-judgment ruling. *See Pet.* at B43-44. The Fifth Circuit declined to address the waiver issue expressly[14] but — again not surprisingly given Jenkins's arguments to the district court — cited the four-part test he criticizes. *Pet.* at A7-A8.

Having failed to complain of the test to the district court and instead affirmatively urging the application of it, Jenkins should not be heard to complain about the Fifth Circuit's approach, much less make it the focal point of his request

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10. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

11. Brief in Support of Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment ("*MSJ Resp. Brf.*") at 32.

12. *Compare Pet.* at 9-10 *with MSJ Resp. Brf.* at 32 ("Remarks may serve as sufficient evidence of discrimination if the offered comments are: (1) race related; (2) proximate in time; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue.") (quoting *Van v. Anderson*, 199 F. Supp.2d 550 (N.D. Tex. 2002)). *Van* cites *Brown* as authority for its statement of the test. *Van*, 199 F. Supp.2d at 567.

13. *MSJ Resp. Brf.* at 32-34.

14. *See Brief of Appellees* at 43-44 (pointing out the waiver).

that the Court entertain the case. Jenkins's forfeiture below precludes this case from being an appropriate candidate to review the larger issue he raises in the petition.

B. Jenkins Misdescribes the Fifth Circuit's Opinion as Dealing with the Admissibility of Evidence.

In several places, Jenkins discusses the four-part test that is the centerpiece of his petition in terms of relevance and admissibility, subtly suggesting that the Fifth Circuit excluded from evidence the alleged remarks he points to. *See Pet.* at 9 (referring to the test as one "of relevance for so called 'stray remarks'"), 13 ("the Fifth Circuit raises the admissibility bar far beyond simple relevance"), 13 (the Fifth Circuit requires lower courts to "throw ... out" such remarks), 15 (remarks are "discarded as irrelevant"). The Fifth Circuit here did no such thing. This case is not about the exclusion of evidence. It is about whether the purported evidence Jenkins relies on, all of which was considered by the lower courts, is legally sufficient in this particular factual context to support a finding of race discrimination.

There is only one reason for Jenkins's mistaken approach. It appears first in his footnote 29. There he points to *Sprint/United Management v. Mendelson*, No. 06-1221, in which this Court granted a petition for writ of certiorari to decide questions concerning the admissibility of evidence in an employment-discrimination case. Jenkins obviously is trying to make the Court believe that the issues in this case are related to the issues in *Mendelson*. He expressly asks the Court to hold his petition pending the disposition in *Mendelson*. But his approach is all spin. No one sought exclusion from evidence of the alleged comments Jenkins relies on, and the district court did not exclude them. The

Court should reject Jenkins's transparent attempt to secure interest in his case by appending it to another case the Court has agreed to hear.

Methodist notes, however, that Jenkins's desired approach *does* significantly conflict with a Rule of Evidence. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." FED. R. EVID. 404(a). Indeed, the problem is compounded given the recent amendment to the rule limiting the exceptions in Rule 404(a) to criminal cases. The comments to the 2006 amendment explain that "in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait." FED. R. EVID. 404 cmt. 2006 Amend. Rule 404(b) remains applicable to civil cases, but flatly prohibits the use of "other crimes, wrongs, or acts . . . to show action in conformity therewith." FED. R. EVID. 404(b). And as one scholar explains, none of the exceptions to that prohibition can legitimately be used in an employment-discrimination case.[15] In any event, admissibility is not the issue here, so the Court should not be drawn in by Jenkins pretending otherwise.

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15. *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 Yale L.J. 1063 (2005) (pointing out that courts routinely violate Rule 404 and arguing for an employment-discrimination exception to the rule); *id.* at 1065 ("the effect of Rule 404 seems clear: It prohibits the plaintiff from admitting such evidence for the purpose of proving a propensity to discriminate"); *id.* at 1074-82 (explaining that the exceptions for "motive" and "intent" do not properly apply in employment-discrimination cases).

C. The Alleged Conflict with *Reeves* and Other Circuit Courts Does Not Support Review.

Jenkins's argument that the Fifth Circuit engaged in some egregious departure from this Court's ruling in *Reeves* about the evidentiary value of discriminatory remarks is based on a false premise. Specifically, the argument is grounded on his assertions that Barnett is "the hospital manager principally responsible for summarily suspending" him. *Pet.* at i. But as shown above, that assertion and the many others like it are false. *See supra* Part I.A. Given that no record evidence suggests that Barnett, although technically in a position to, did in fact make, direct, or exert influence over the decisions Jenkins challenges, the heart of Jenkins's entire argument fails. Without that asserted but factually incorrect premise, there is not even an arguable conflict with *Reeves* on the discriminatory remarks point. Accordingly, the Court should deny the petition.

Putting aside that problem, Jenkins is wrong to suggest that this Court prohibited circuit courts from evaluating alleged discriminatory remarks for their legal sufficiency and instead held that any alleged discriminatory remark makes the case a jury case regardless of the circumstances of the remark and the challenged decision. In *Reeves* the Court found that discriminatory remarks not made in the context of the plaintiff's discharge could be probative of age discrimination where the speaker (who was the plaintiff's supervisor) commented *to the plaintiff* that he "was so old [he] must have come over on the Mayflower" and told him that *he* "was too damn old to do [his] job." *Reeves*, 530 U.S. at 151. There are at least two reasons this case is different.

First, with respect to all but one of Barnett's[16] alleged remarks, none demonstrates any race-based bias in general, let alone race-based bias toward Jenkins, including (i) the alleged pre-1994 statement about why a Hispanic physician would think he would have the right to go to medical school; (ii) the alleged statement to an African-American physician that Barnett could teach a monkey to practice medicine the way that doctor practiced; (iii) the alleged statement about never getting rid of Jenkins; and (iv) the alleged statement by Barnett that he would not allow Jenkins to treat his dog.[17]

Second, Barnett's alleged reference to African-Americans as "gun-toting, drug pushing spooks" at some point between 1994 and 1999 does not save Jenkins's case.[18] That slur, if made, would unquestionably demonstrate race-based animus, but it does not constitute evidence that Jenkins's cath-lab privileges were suspended based on his race because it was not made to Jenkins, does not refer to him, and was not made in connection with the suspension decision. P-App.-637. *Reeves* does not stand for the proposition that an alleged racial remark can satisfy the plaintiff's burden to prove discrimination without at least one of those facts being shown. *Reeves* held that evidence of

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16. Jenkins briefly mentions alleged remarks by persons other than Barnett, but Methodist does not believe those mentions warrant a specific response.

17. The last alleged statement is the one to which Jenkins's trial lawyer improperly added the word "boy," leading to sanctions by the district court.

18. Although the Court must assume because of the procedural posture of the case that the comment was made, it should be noted that Barnett strongly denied making it.

statements to and about the plaintiff were legally sufficient even though they were not made in the context of the plaintiff's discharge. *Reeves*, 530 U.S. at 151. It did not hold that comments about others not made to the plaintiff were legally sufficient evidence even when not made in the context of the discharge. Jenkins simply reads *Reeves* too broadly.

Jenkins also presents his argument as though the lower courts engaged in a mechanical application of the four-part test he criticizes. In fact, both courts recited the test in one form or another, but they also explained that the statements were not such that a reasonable jury could find race discrimination in the decision Jenkins complains of based on them. *Pet.* at A7-A8, B43-44. It is only because Jenkins seeks to allow widespread speculation by juries about motives for challenged decisions that he is able to argue otherwise. That can be seen in his reliance on statements that may reflect dislike or distrust of Jenkins but have nothing to do with Jenkins's suspension or his race.

In any event, the other critical factor in *Reeves* — that the statements be by someone principally responsible for the decision — also is missing here, as explained above. For all of those reasons, there is no conflict between the Fifth Circuit's decision and *Reeves*.

Nor is there a conflict with other circuits. Jenkins's argument otherwise is hardly a serious effort at showing a circuit conflict. And there are obvious factual differences between this case and the cases Jenkins cites on pages 16 to 17 of his petition. Jenkins has pointed to no decision involving a factual pattern similar to this case where the court held there was sufficient evidence to support a finding of illegal discrimination.

In sum, there is no conflict between the Fifth Circuit's opinion here and either prior decisions of this Court or those of other circuits, and certainly there is no such conflict so significant as to warrant review by this Court.

III. JENKINS'S ARGUMENTS ABOUT HIS *PRIMA-FACIE* CASE AND OTHER CLAIMED EVIDENCE DO NOT WARRANT REVIEW.

Jenkins criticizes the lower courts for assuming that he proved a *prima-facie* case of discrimination and proceeding to analyze the last step of the *McDonnell-Douglas* method of proof. He suggests that the lower courts ignored his evidence of a *prima-facie* case despite the holding in *Reeves* that such evidence also is to be considered at the "pretext" stage of the analysis. He is wrong. Simply because the courts did not separately discuss his purported *prima-facie* case evidence does not, of course, mean they ignored it. Courts frequently, for the sake of efficiency, assume that certain threshold requirements are satisfied and go on to resolve cases on other issues. Surely *Reeves* did not prohibit that common practice.

Besides, Jenkins far overstates the strength of his *prima-facie* case. His evidence was exceedingly weak to the point that there is a substantial question whether Jenkins made out a *prima-facie* case at all. He points mostly to alleged facts that are critical of Methodist but do not show that its stated reasons for its actions are false (*e.g.*, the alleged "gratuitous severity" of the suspension). Relatedly, he offers opinions that obviously lack sufficient personal knowledge to be properly considered. *See* FED. R. EVID. 602, 701.

Jenkins also seems to argue that the decision of the fair hearing panel means that Methodist's stated reason for the suspension was pretextual. That approach misses the issue: the circuit courts agree that the issue in a discrimination case is not whether the defendant was correct or incorrect in its assessment of the plaintiff's conduct or performance and so challenging the factual accuracy of the underlying matter relied on by the defendant is wholly insufficient. *Pet.* at A9.[19]

And finally, Jenkins could point to no similarly situated physician who Methodist treated more favorably. His arguments otherwise ignore the meaning of "similarly situated." He has offered no evidence that the decisions about the others he points to were made by the same persons (or groups of persons) who made the suspension decision about him. It is well-settled among the circuit courts that persons are not similarly situated when different decisionmakers are involved.[20]

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19. *See, e.g., Swackhammer v. Sprint/United Management Co.*, ___ F.3d ___, 2007 WL 1969672, *4-*5 (10th Cir. July 9, 2007) ("Evidence that the employer should not have made the termination decision — for example, that the employer was mistaken or used poor business judgment — is not sufficient to show that the employer's explanation is unworthy of credibility."); *Helland v. South Bend Community School Corp.*, 93 F.3d 327, 330 (7th Cir. 1996) ("What matters here is not whether there is evidence contrary to that relied on by the School Corporation in deciding to remove Helland from the substitute list, but whether the School Corporation believed the information was correct."); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 816 (5th Cir. 1993) ("The fact that the employer's reasonable belief eventually proves to have been incorrect ... would not change the conclusion that the firing had been non-discriminatory.")

20. *See, e.g., Little v. Illinois Dep't of Revenue*, 369 F.3d 1007, 1012 (7th Cir. 2004) ("A similarly-situated employee must have been

(Cont'd)

IV. OTHER REASONS TO DENY THE PETITION

Even accepting Jenkins's incorrect description of Barnett's role and the sufficiency of the alleged statements under *Reeves*, there are reasons to reject Jenkins's request for review. The enormous gulf Jenkins claims exists between *Reeves*'s and the Fifth Circuit's approaches for evaluating alleged discriminatory remarks involves employment-discrimination cases. This is not an employment case; Jenkins was not and does not claim to have been an employee of Methodist. It would be odd to use a non-employment case to resolve a purported significant and persistent refusal by a circuit court to properly analyze evidence in employment cases. So even if the Court thought there were such a refusal taking place, this case would not be the vehicle for addressing it.

In addition, the Court would have to make a significant assumption if it accepted this case. The Fifth Circuit has interpreted *Desert Palace* as effecting a change in the traditional *McDonnell-Douglas* three-step method of proving discrimination that allows a plaintiff to prevail through showing that a protected characteristic is only a "motivating factor" in

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(Cont'd)

disciplined, or not, by the same decisionmaker who imposed an adverse employment action on the plaintiff."); *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 305 (5th Cir. 2000) ("similarly situated" requirement not satisfied where plaintiff and co-worker held different jobs, had different performance problems, and "[m]ost importantly," were subject to different decisionmakers). *Accord Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 692 (8th Cir. 2002); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2000) (quoting *Stanback v. Best Diversified Prods., Inc.*, 180 F.3d 903, 910 (8th Cir. 1999)); *Heyward v. Monroe*, 166 F.3d 332 (4th Cir. 1998).

the employment action at issue.[21] The lower courts here applied that standard, and no party objected to it. But there is a significant question whether *Desert Palace*, which was interpreting specific language in Title VII of the Civil Rights Act of 1964,[22] modifies the *McDonnell-Douglas* approach at all[23] or somehow applies to statutes that do not contain the language in Title VII that the Court was interpreting. Although Methodist did not find it necessary to object to the approach, the Court should be leery of taking a case where it would have to make such a tenuous assumption to resolve the questions presented.

Finally, this case also involves two dispositive issues that the Fifth Circuit did not reach. First, although 42 U.S.C. § 1981 prohibits race discrimination in the making and enforcing of contracts, Jenkins neither produced nor identified evidence of a contract that Methodist's conduct denied him the right to make or enforce. *See Brief of Appellees* at 18-25. Second, the actions

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21. *See Pet.* B40-41; *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (modifying in an age-discrimination case the final step so that after a defendant offers a legitimate, nondiscriminatory reason for the employment action at issue, the plaintiff must show "either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct and another 'motivating factor' is the plaintiff's protected characteristic (mixed motives alternative)").

22. *Desert Palace, Inc.*, 539 U.S. at 94-95 (interpreting 42 U.S.C. § 2000e-2(m)).

23. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (if an employer states a legitimate, nondiscriminatory reason for the challenged decision, under *McDonnell Douglas* "the only remaining question would be whether respondent could produce sufficient evidence from which a jury could conclude that petitioner's stated reason for respondent's rejection was in fact pretext") (internal quotation omitted).

of Methodist that he complains about — a temporary suspension of part of his clinical privileges during a medical peer review, along with a legally required but later voided report of the suspension to the NPDB — are not cognizably "adverse" so as to support a § 1981 claim. *See Brief of Appellees* at 25-30.[24] Thus, deciding the issues Jenkins says warrant review would not come close to resolving this case. For that reason too, the Court should decline review.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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24. This Court's decision in *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006), has no bearing on whether the alleged harm to Jenkins is cognizable as that decision is limited by its terms to the particular language in Title VII's retaliation provision.

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No. 06-1688

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

G. MARK JENKINS, M.D.,

Petitioner,

v.

METHODIST HOSPITALS OF DALLAS, INC.; HOWARD CHASE; JOHN HAUPERT; JACK BARNETT; KELLY WOLFE; TIM MEEKS; AND KIM HOLLON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY

I. Factual Disputes Concerning Dr. Barnett 1

II. Hospital's Arguments About Remarks Are Unsound. 4

A. No waiver in the district court. 4

B. No distinction between excluding racial remarks and disregarding them as non-probative. 4

C. Conflicts with *Reeves* and other circuits 6

III. The Failure To Credit Jenkins with Favorable Inferences from His Prima-facie Case Warrants Review 8

CONCLUSION 10

TABLE OF AUTHORITIES

Pages

Cases

Abramson v. William Paterson Coll. of N.J., 260 F.3d 265 (3d Cir. 2001) 2

Bergene v. Salt River Project Agr. Imp. and Power Dist., 272 F.3d 1136 (9th Cir. 2001) 3

Brown v. CSC Logic, Inc., 82 F.3d 651 (5th Cir.1996) 6

Court. See McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273 (1976) 9

Griffin v. Wash. Convention Ctr., 142 F.3d 1308 (D.C.Cir.1998) 2

Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir.2004) (en banc) 3

Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991) (en banc) 3

Patel v. Midland Memorial Hosp., 298 F.3d 333 (5th Cir.2002) 6

Rubinstein v. Adm'rs of Tulane Educ.Fund, 218 F.3d 392 (5th Cir.2000) 6

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46 (1st Cir.2000) 2

Tomassi v. Insignia Financial Group, Inc., 478 F.3d 111 (2nd Cir.2007) 8

Willis v. Marion County Auditor's Office, 118 F.3d 542 (7th Cir.1997) 2

Rules

Fed. R. Evid. 401 ..... 5, 7
Fed. R. Evid. 402 5
Fed.R.Evid. 404(a) 5

Other Authorities

114 Yale L.J. 1063, 1082 (2005) 6

ARGUMENT IN REPLY

The Response makes scant effort to dispute the conflict between the decision below and this Court's decisions in *Reeves* and *Desert Palace*. It similarly makes little effort to deny the split between the Fifth Circuit and other circuits regarding *Reeves's* clear endorsement of indirect evidence of racial animus and its rejection of the stray comments doctrine. Instead, the Response seeks to raise a variety of factual issues that are wholly irrelevant in this Court, given the procedural posture of this case, which requires all evidence and inferences be viewed in the light most favorable to Petitioner. Even more fundamentally, they are irrelevant given that the Fifth Circuit not only did not rely on the factual disputes raised by Respondents, but in fact rejected them, instead ruling based on its erroneous legal conclusion that, because Dr. Barnett's racist conduct and comments were not made in the context of Dr. Jenkins's summary suspension, they did not constitute relevant evidence of animus and therefore could not be considered on summary judgment. Once the chaff of Respondents' irrelevant factual arguments is swept away, it remains the case that the Fifth Circuit is squarely at odds with this Court and other circuits on the questions presented. The Petition should either be granted or held for the similar question raised in No. 06-1221 (*Mendelson*), currently pending.

I. Factual Disputes Concerning Dr. Barnett.

The hospital disputes Dr. Jenkins's account of the facts, attempting to make two main points. First, it contests Petitioner's characterization of Dr. Barnett as a "bigot," not so much because the shocking things he has said and done do not permit this inference, but because "bigot" it is not a nice word. They are right about that. It is an awful word, describing an awful thing. But a man who has referred to blacks as "gun-toting, drug pushing spooks," told a black physician that he could "teach a monkey" to practice medicine the way he did, told Jenkins during his initial interview that he wouldn't

let him treat his dog, believes that minorities have no right to go to medical school, and insults and has falsely accused minority doctors (including Jenkins) in an effort to hound them out of the hospital is, quite simply, racist. *See* Pet. at 5-6, *citing* record. And this case concerns whether and under what circumstances an influential decision-maker's persistent pattern of racism and bigotry in the workplace is probative of animus. The Fifth Circuit has ruled broadly and categorically that the evidence of this, consisting of both racial remarks and mistreatment of other similarly situated minority individuals, is nonprobative of animus and cannot be considered because the remarks do not constitute direct evidence of his racial animus in his particular decision to go after Jenkins. This is the same mistake they made in *Reeves*, they have made it repeatedly, *see* cases cited Pet. at 15, making it clear that this Court's unanimous correction of their error *seven years ago* in *Reeves* did not sufficiently make the point.

Second, the hospital expends *11 pages* pretending that Dr. Barnett's conduct should not be attributed to the hospital – i.e., that he was not the hospital's agent – a defense that it has twice lost. Moreover absence of agency was not the basis for the decision below. Both lower courts concluded that Barnett's involvement was sufficient to warrant imputing his animus, if any, to the hospital, such that it was necessary to analyze the content of his remarks. The Fifth Circuit's review of the record led it to conclude that Barnett "was *obviously* in a position to influence the decision to suspend Dr. Jenkins," App. A7 (emphasis added), which it deemed sufficient. And there is widespread support among other courts of appeal for the agency test used below. *See Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir.2000); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.C.Cir.1998); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir.1997); *Bergene v. Salt River Project Agr. Imp. and Power Dist.*, 272 F.3d 1136,

1141 (9th Cir. 2001). *But see Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir.2004) (en banc). And, of course, the hospital has not cross-petitioned to challenge the Fifth Circuit's test, in any event.

Moreover, their discussion of Barnett's role does little more than present the hospital's favorite evidence, spun liberally in its favor, while ignoring much of the evidence showing Barnett's pervasive influence and involvement in the decision to summarily suspend Jenkins. Under a proper application of the standard of review crediting all evidence and inferences in favor of the nonmovant (Dr. Jenkins), *see Reeves*, 530 U.S. at 150-151, the disputes raised by the hospital are no more than jury questions. They have no relevance to this petition which seeks review of a summary judgment granted on a different legal ground. As both courts below plainly recognized, the evidence of Barnett's role was ample to impute his conduct to the hospital or at least raise a disputed issue of fact on the point, and hence cannot be the basis for defending the grant of summary judgment below.[1]

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[1] The oddly fine distinction, not asserted below, that the Response seeks to draw between a "hospital manager" and someone like Barnett who manages a hospital department is immaterial in a doctor-discipline case. "[T]he staff is acting as an agent of [the hospital] during the peer review process and as such is indistinct from the hospital." *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 702-703 (4th Cir. 1991) (*en banc*).

Also, the opposition identifies a mistake in the Petition concerning the timing of Dr. Fraga's tenure on the CMB. The error was inadvertent and is immaterial. Dr. Fraga's affidavit criticizes the CMB, including Dr. Barnett, for failing to properly investigate the accusations against Jenkins before summarily suspending him. Pl. App. at 644-645. While Fraga did not join the CMB until "shortly after Jenkins' privileges were summarily suspended," Jenkins suspension endured for seven months, during which the matter came up at subsequent CMB meetings. Fraga states that his views about CMB recklessness were formed "as a result of taking part in those [CMB] meetings and observing my colleagues, including Howard Chase, Kim Hollon, and Jack Barnett" *Id.* This is more than sufficient personal knowledge.

II. Hospital's Arguments About Remarks Are Unsound.

A. No waiver in the district court.

The hospital argues that by citing the four-part "stray remark" test in his brief to the district court, Dr. Jenkins waived his right to complain about it here. Nonsense. While he tried to meet the four-part test that the Fifth Circuit has long followed, he did so only in the section of his brief entitled "Direct evidence of racially based discrimination directed at Dr. Jenkins."[2] This is its proper (and *only* proper) role. The immediately following section of his brief, which is devoted to *indirect* evidence, cites *Reeves* repeatedly. At the summary judgment hearing, the district court stated that she was "not prepared on this record to conclude ... that the remarks that are the basis for the claim are stray and not racially related" and that "those require context before making a determination."[3] Thereafter Jenkins's counsel urged the court, if reluctant to conclude that the remarks were direct evidence of discrimination, to "draw an inference from the situation, the words, the reason why they say they did what they did."[4]

B. No distinction between excluding racial remarks and disregarding them as non-probative.

Dr. Jenkins's Petition notes that the Court is currently considering a very similar issue in *Sprint/United Management v. Mendelson*, 06-1221, a case in which the district court excluded at trial so-called "me too" testimony by five former employees who contended that, like Mendelson, they too

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[2] Brief in Support of Pl.'s Resp. to Defs.' MSJ at 32 (emphasis added).

[3] 8 Tr. at 106.

[4] 8 Tr. at 128, *et seq.*

were discriminated against on the basis of age.[5] The hospital tries to distinguish *Mendelson* by arguing that the Fifth Circuit did not *exclude* the evidence of Barnett's remarks, but merely disregarded it on the basis that it was not probative of animus. This is a distinction devoid of difference explained by the different procedural postures of the two cases. Whether a plaintiff's witnesses are precluded from testifying at trial because their situations are insufficiently similar to the plaintiff's to have relevance, or the plaintiff's summary-judgment affidavits from analogous witnesses are declared to have no probative value, the result is the same. So is the legal analysis performed by the district court. *See, e.g., Boyle v. Mannesmann Demag Corp.*, 1993 WL 113734 (6th Cir.) (unpublished) ("...we have held repeatedly that such [stray] remarks are irrelevant and unduly prejudicial. As such, they must be excluded."); *see also* FED. R. EVID. 402 ("Evidence which is not relevant is not admissible."), FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

The hospital also argues that Barnett's remarks should not count against it because, as his "character trait," they are inadmissible under FED.R.EVID. 404(A). The journal article it cites for this proposition, however, sides with Jenkins, calling it "well-settled law" that a defendant's prior discriminatory treatment of either a plaintiff or other employees is relevant and admissible to show that his action against the plaintiff

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[5] Jenkins's case is more compelling than *Mendelson*. In Jenkins, the other two minority doctors who claim to have been mistreated by the hospital blame Barnett himself or claim to have overheard Barnett say racist things, as does Jenkins. By contrast, in *Mendelson* many if not all of the "me too" witnesses were complaining of the comments or actions of supervisors other than the one whose animus allegedly affected Mendelson. *Mendelson*, 06-1221, Cert. Pet. at 4-5.

was motivated by animus.[6] The author believes this to be sound policy:

> Excluding propensity evidence in discrimination suits would therefore do more than drastically tip the scales in defendants' favor... It would literally preclude relief for many employees who have suffered discrimination under circumstances for which Congress clearly intended to provide redress.[7]

Whichever way this Court is inclined on this interesting issue, the Petition squarely presents it, and the controversy the article elucidates is a reason to grant, not to deny, the Petition.

C. Conflicts with *Reeves* and other circuits.

Reeves. The Petition explains that, in *Reeves*, this Court disapproved of the Fifth Circuit's rejection of all discriminatory remarks that "were not made in the direct context of [the plaintiff's] termination," *Reeves*, 530 U.S. at 152-153 *citing* 197 F.3d at 693 (5th Cir. 1999), as constituting a misapplication of the standard of review and impermissible usurpation of the jury function. 530 U.S. at 152-153. The test that the lower court applied, and this Court rejected, in *Reeves* is the same one that the Fifth Circuit invoked to throw out the evidence of Barnett's animus.[8] That the facts in *Reeves* are not precisely identical to those here is unimportant because the legal issues presented by the facts are the same in both cases.

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[6] "The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits," 114 Yale L.J. 1063, 1082 (2005).

[7] *Id.* The author suggests that Rule 404 should include an express employment-discrimination exception.

[8] The test used in both *Reeves* and *Jenkins* is from *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir.1996). *C.f. Reeves*, 197 F.3d at 692 n.15 *citing Brown*, 82 F.3d at 655 (5th Cir.1996), with *Jenkins*, 478 F.3d at 261-262 *citing Patel v. Midland Memorial Hosp.*, 298 F.3d 333, 343-344, *citing Rubinstein v. Adm'rs of Tulane Educ.Fund*, 218 F.3d 392, 400-01 (5th Cir.2000) *quoting Brown*, 82 F.3d at 655.

The hospital's argument justifies the decision below only in a world where clear and unanimous Supreme Court decisions are issued, not to be studied for what they teach about the law, but to be limited to their facts by the very appellate court that was previously reversed for making the virtually identical error. The federal courts would cease to function if such an approach were widely followed.

The hospital next describes Petitioner's legal argument incorrectly and then attacks the "straw man" of its own creation. It is *not* Petitioner's position that "any alleged discriminatory remark makes the case a jury case regardless of the circumstances of the remark and the challenged decision." Resp. at 19. Rather, Petitioner maintains that a pattern and practice of racism by a key decisionmaker involved in hospital personnel decisions generally (and in the plaintiff's specifically) is probative of racial animus even when indirect. The Fifth Circuit's decision below goes about as far as it is possible to go in the opposite direction by requiring courts to disregard *every* discriminatory remark that is not itself *direct* evidence of race-discrimination. By raising the relevance bar above the usual one of "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable..." FED. R. EVID. 401, the test the Fifth Circuit employs in this and other recent cases violates *Reeves*'s fundamental teaching "that trial courts should not 'treat discrimination differently from other ultimate questions of fact,'" 530 U.S. at 148 (internal citation omitted). This case well illustrates the distortions that can result from this arbitrary and categorical approach.

Other circuits. Post-*Reeves*, the Fifth Circuit stands alone in requiring that *all* discriminatory remarks that do not pass its four-part test for direct remark-based evidence be discarded as non-probative of racial animus. As reflected in the Petition, no other circuit uses this test, and four circuits – the Second, Seventh, Eighth, and the District of Columbia – have issued well-reasoned decisions rejecting such categorical ap-

proaches as untenable. *See* Pet. at 16-17. Most recently, see *Tomassi v. Insignia Financial Group, Inc.*, 478 F.3d 111, 114-116 (2nd Cir. 2007) (disapproving of categorical "stray remark" approaches and holding that when supervisor's age-related remarks were considered in the context of all the evidence, they were legally sufficient to sustain an inference that he was motivated in part by age discrimination).

III. The Failure To Credit Jenkins with Favorable Inferences from His Prima-facie Case Warrants Review.

There is no credible dispute in this case that Dr. Jenkins was subject to disparate treatment. The courts below have never denied such disparity – they just failed to draw the required inferences therefrom. Respondents' suggestion that the AHC's recommendation to terminate privileges is "more severe" than summary suspension ignores not only contrary evidence and authority,[9] but misses Jenkins's central point: An ad hoc committee, by nature, recommends. Absent summary suspension, nonconsensual discipline cannot be imposed until after the full-blown fairness hearing, which is very difficult for the hospital to manipulate. Jenkins had nothing to fear from the truth. But Barnett and those in league with him invoked the one and only disciplinary device that could penalize him before there was a fair opportunity for him to learn of their manipulations and expose them.[10] When he had that opportunity, he was resoundingly cleared. App. D1-D3.

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[9] *See* Pet at. 3-4 citing authority; Pet. at 4-5 n.4-5; Pet. at 8 n.18-19 citing authority; and Pl.App. at 629.

[10] The Petition only scratches the surface on the manipulation ("mendacity") issue. The hospital executive who presented the hospital's case against Jenkins to the AHC (Defendant Haupert) not only vouched for the credibility of the four complaining cath-lab witnesses, he presented their testimony as though it were typical of cath-lab opinion. It was not, as the numerous cath-lab affidavits attest. Moreover, one of the four witnesses had called Jenkins a "nigger." Another is one whose promotion Jenkins had actively opposed and who later admitted that he "hated" Jenkins. The

The hospital does not claim that any cardiologist other than Jenkins has been disciplined or even peer-reviewed for hostile conduct.[11] That the hospital singled out only its black cardiologist to take the fall for the hostile environment in its cath lab permits, and possibly compels, an inference of disparate treatment. That the precise ethnicity of the other offending cardiologists is unknown is irrelevant. We know they are hospital cardiologists other than Jenkins and that they were not black. Jenkins is the second black cardiologist ever to work at the hospital and the first to work in the cath lab. There is neither evidence, nor assertion by the hospital, that *any* other cath-lab cardiologist during the relevant period was black.

The hospital's suggestion that because the committees involved in peer-reviewing Jenkins did not have precisely the same members as those who dealt with Drs. V and T and hence cannot be compared for purposes of disparate treatment was rejected by the court below. It is also inconsistent with clear precedent from this Court. *See McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 283 n.11 (1976) (the "similarly situated" inquiry does not require "precise equivalence" but only that *other* "employees involved in acts against (the employer) be of comparable seriousness") (internal citation omitted).

Finally, contrary to Respondents' suggestion, Dr. Jenkins does not criticize the practice of assuming that a party has

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third simply repeated her previous complaint against Jenkins, which *the hospital had already found* to be without merit. The fourth, an African-American who may have been asked to appear for that reason, later regretted his involvement and gave an affidavit attesting that Dr. Jenkins was "set up" because of his race.

[11] That is why *the hospital* introduced for comparative purposes the examples of Drs. T and V, two *noncardiologists*, with these words: "[Dr. Jenkins's] statement that no other doctors have been peer reviewed at MHD for *conduct similar to his* is incorrect: in the past five years two other doctors - one white and one Hispanic - have also been peer-reviewed for such problems." Reply Br. in Support of Defs.' MSJ, at 21-22.

proved one element, in order to reach another element that is more easily disposed of. The *McDonnell Douglas* framework, however, does not consist of independent substantive-law elements. Instead its burden-shifting algorithm consists of discrete analytical steps that must be followed in sequence precisely because they are *not* independent. Moreover, this would be a different case if the Fifth Circuit had, after assuming the existence of a prima facie case, then gone on to credit Jenkins with the favorable inferences from the disparate-treatment evidence that the standard of review entitles him to. But it did not do that, gave no plausible explanation for declining to, and explicitly disregarded all other circumstantial evidence as insufficiently direct. In doing so, it was in direct and inexplicable conflict with this Court's decisions in *Reeves* and *Desert Palace* and with the standard applied in other circuits.

IV. CONCLUSION

As the Petition well establishes, and Respondents barely dispute, the Fifth Circuit's stray comments doctrine applied in this case is in conflict with the decisions of this Court and many other circuits. That erroneous doctrine was the legal basis for the decision below and the primary basis for the Petition. The numerous factual and other defenses the hospital raises in its brief in opposition have nothing to do with the question presented, ignore the procedural posture of this case, and are not sound reasons for denying certiorari. This Court should therefore grant the Petition to correct the Fifth Circuit's rogue reliance on a legal doctrine that was rejected in *Reeves* and that prevents plaintiffs from putting on, and having considered, probative indirect evidence of racial animus. In the alternative, this Court should hold this case pending its decision in the comparable case of *Sprint/United Management v. Mendelson*, 06-1221, now before this Court for full review.

Respectfully submitted,

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